Supreme Court of the United States.

OCTOBER TERM, 1889.

Nos. 240, 168.

THE PEWABIC MINING COMPANY, JOHNSON VIVIAN, HENRY BILLINGS, THOMAS H. PERKINS, ALDEN B. BUTTRICK, DANIEL L. DEMMON, and THE PEWABIC COPPER COMPANY, *Defendants and Appellants,*

vs.

THOMAS H. MASON, WILLIAM HART SMITH, and SULLIVAN BALLOU, *Complainants and Appellees,*

} *Appeal.*

AND

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} *Cross-Appeal.*

BRIEF FOR COMPLAINANTS ON APPEAL AND CROSS-APPEAL.

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JUDD & DETWEILER, PRINTERS.

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The decree below (Record, p. 923) gave substantially all the relief prayed for in the bill, except that it denied to complainant stockholders the right to a receiver and an accounting from the board of directors of the Pewabic Mining Company for the funds received by them after the expira-

tion of the charter of that company, or expended by them in carrying on the business of said company otherwise than in and about and for the purpose of liquidation.

This is the only error we assign and is the sole ground of our cross-appeal.

STATEMENT OF FACTS.

We can make no more concise presentation of the general features of the case than is found in the opinion of the learned justice who heard and decided the case at circuit, as follows:

"The Pewabic Mining Company was organized as a corporation for mining copper and other ores, under the laws of Michigan, on April 4th, 1853, for thirty years, with a capital stock ultimately of 40,000 shares of $25 each, invested in a copper mine near Houghton. The complainants are owners of 2,650 shares of the stock out of the whole amount, all of which has been issued. Although the period for which the company was incorporated expired on April 4, 1883, the directors elected in March of that year, in apparent ignorance of the fact, continued its ordinary business. On March 26th, 1884, the regular annual meeting of the stockholders for the election of directors and for other purposes was held pursuant to notice duly given, at which the following resolutions were adopted against the vote and protest of the complainants:

"'*Resolved*, That the board of directors be authorized to sell and dispose of the property of the company for a sum not less than $50,000; that the president and secretary be authorized to execute all conveyances necessary to carry out the contract for the sale of the property of this company made by the board of directors, and that board of directors be, and hereby are, authorized to close up the business of the company.

"'*Resolved*, That it is the sense of this meeting of stockholders that the property of this company shall be sold to a new corporation organized under the laws of Michigan on the basis of forty thousand shares, and that the stock of such new corporation shall be issued to and received by the stockholders of this company in payment for the same, stockholders to have the right to receive equal numbers of shares

in new company, if they so elect, on surrendering certificates of this company within thirty days after April 12th, 1884, and in case stockholder does not take stock of new corporation he is to receive his *pro rata* share in money.'

"The vote in favor of the adoption of these resolutions was 27,919 shares against 6,754 shares in the negative.

"On the same day, March 26th, 1884, a certificate of incorporation was executed under the laws of Michigan to form 'the Pewabic Copper Company,' and filed March 28th. Its capital stock, 40,000 shares of $25 each, was taken up by these corporators, who with two others were named as the first directors, being the same as those who controlled the old company, and the third article of association declared that 'no cash is actually paid in on the capital stock; the cash value of the real and personal property conveyed to the company contemporaneously with its organization is the sum of fifty thousand dollars.'

"It was provided by a statute of Michigan, 1 Howell's Statutes, 1244, sec. 4867, that 'all corporations whose charters shall expire by their own limitation or shall be annulled by forfeiture or otherwise shall nevertheless continue to be bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and divide their capital stock, but not for the purpose of continuing the business for which such corporations have been or may be established.'

"The present bill was filed March 31, 1884, its main object being to prevent by injunction the proposed sale of the property of the Pewabic Mining Company to the Pewabic Copper Company, and to have the same sold under the order of the court at public auction to the highest bidder for cash, and the proceeds, after payment of the debts of the corporation, divided equally among the stockholders. It also prays, as against the officers and directors of the company, an account of all monies received by them since April 4, 1883, including assessments on stock alleged to have been made and paid, and which, it is averred, were illegally used in the prosecution of the business of the corporation after its dissolution, and at a loss. The general grounds of the relief prayed for are that the transactions complained of are illegal

for want of power on the part of the defendants to undertake them, and on the further ground that they are fraudulent as against the complainants, particularly that the price fixed upon the property of the company as the consideration of its sale and conveyance is grossly inadequate.

"The answer insists upon the lawfulness of the proceedings questioned, and that the proposed sale and conveyance of the corporate property to the new company is in good faith for its fair value, and is the best mode of disposing of it for the benefit of the stockholders, and denies all fraud charged.

"Under the statute quoted above the Pewabic Mining Company continued to be a body corporate after April 4, 1883, notwithstanding the expiration of the time limited in its charter for the prosecution of its business, for the purpose of winding up its affairs. For this purpose it continued to exist as a corporation, and could do all necessary corporate acts suitable to that end, and it retained its corporate organization, acting through directors and officers elected and appointed as has been customary, and its stockholders continued to be such, with all their rights and powers. The directors in office at the time when the corporation was dissolved as to future business did not cease to be such and become statutory trustees for winding up, nor were the stockholders converted into *cestuis que trust* merely of the assets of the company. The existence of the company as a corporation was prolonged for three years in order that it might as a corporate body do the acts and things authorized by the statute, to the end that it might gradually settle and close its concerns by disposing of and conveying its property and dividing its capital stock. Nevertheless the corporation itself and the directors officially, for the purposes of the statute, were trustees for the creditors and stockholders, and were bound to exert all their powers in the disposition of the property for the equal benefit of those equally entitled.

"It is a matter of much doubt, as it appears to me, whether, in view of the language and purposes of the act as against a dissenting stockholder, the corporation and its directors have a discretion to sell the property of the company in liquidation otherwise than for cash; but, without denying the power, it is very clear that they have no right to reorganize the company and its business by the forma-

tion of a new corporation, to which its property is conveyed in exchange for its stock, so as to compel dissenting stockholders to continue in the business which the statute has declared shall be wound up; and, as they have no power to compel all the stockholders to accept interests in the new enterprise in exchange for their shares in the old, neither can they impose arbitrary and unfair terms and conditions upon them for refusing to do so.

"This is the feature in the proposed plan of transferring the assets of the Pewabic Mining Company to the Pewabic Copper Company which presents to my mind the insuperable objection to its confirmation. The complainants are required to receive shares in the new company in exchange for those they hold in the old or, in the alternative, accept their proportion of $50,000 as the value of the whole.

"This sum was arbitrarily fixed by the directors and majority of the stockholders, who were to take the property at that sum; it made no difference to them what nominal valuation was adopted, as their relative interests were not changed; but the valuation was adopted, not with reference to a sale of property to others, but themselves, and is therefore no fair criterion for estimating the value of the shares of those whom they sought to compel, if they parted with their interests, to do so only to their former associates.

"It is true that the defendants in their answer state that the sum named was a fair equivalent for the whole capital stock at its market value, but that may not have been a fair value for the property which that capital stock represented. It is impossible for me, in deciding upon this point, to ignore the finding of the special master appointed for the very purpose of inquiring into the question of value, and who reports, upon the testimony taken, that, in his opinion, the property to be sold is worth nearly $500,000, and the complainants themselves offer in their bill to bid $75,000 for it.

"Whatever power, therefore, the company, by its directors and a majority of its stockholders, may be supposed to have under the statute to sell the corporate assets for the purpose of liquidation, the proposed conveyance to the Pewabic Copper Company, in consideration of its assumption of the debts of the Pewabic Mining Company—which the answer alleges to be part of the understanding—and the exchange of the stock of the former for that of the latter, with the obliga-

tion of dissentients to accept their proportion of $50,000 as the estimated cash value of the whole, cannot be regarded as a sale at all for purposes of liquidation. Its effect is simply to exclude the minority from all further interest in the property by compelling them without their consent to part with their interests at the price fixed by them, to whom they are to be transferred, and that price, as it now is made to appear, far below the fair value of the property."

The statement of facts in the opinion should be added to and modified as follows:

The articles of association of the new company (Record, p. 20) show that its entire capital stock was taken by Daniel L. Demmon, Thomas H. Perkins, and Alden B. Buttrick, all directors of the old company in liquidation, and including its president and secretary, who, by the resolution above quoted, were to execute the necessary conveyance of the assets to the new company, of which they were thus the sole stockholders as well as directors.

Notwithstanding the averment in the answer that the new company was to pay the debts of the old, in addition to the $50,000, the averment was expressly negatived by the testimony. Minutes of the meeting (Record, p. 44) show that the resolution of Mr. Smith, providing for a sale for the payment of debts, was voted down, and that Mr. Chandler's resolution, providing for a sale at $50,000, was carried, without any provision for the debts. The stenographer's minutes of the meeting show that no statement was made in connection with the proposed sale with reference to the debts, and the articles of association of the new company are conclusive on this point, showing that its entire liability for all the property of the old company conveyed to it was but $50,000. Although Demmon says there was an "understanding" that the debts should be paid, his own testimony at page 344 shows that any possible presumption of even an implied contract to pay them was rebutted by the transaction itself.

On filing the bill a restraining order was issued to prevent the consummation of the sale at $50,000. On the motion for injunction, heard on affidavits and bill and answer April 23, 1884, the parties were in direct conflict as to the value of the property, the appellant still contending that $50,000 was a fair price. The court, being in doubt, reserved decision until May 12, 1884, and of its own motion appointed Hon. Matthew H. Maynard special master to examine and ascertain the description and fair value of the property, and directed the parties to take proofs on that issue before him. (Record, p. 64.)

The mine proper is on what is known as the "Pewabic lode." This is in the heart of the copper region of Michigan, whose product is seven-tenths of the entire copper production of the United States. The lode is second in value in the State; the first being the Calumet and Hecla (Charles H. Palmer's testimony, page 89; the Quincy, situated next to the Pewabic mine, stands second in point of quantity and value of copper production. Across the Pewabic mine from the Quincy, and next to it on the other side, is the Franklin mine, another of the best on Lake Superior. The property embraces the village of Pewabic, which is a suburb of the town of Hancock, and is situated near the summit of an adjacent hill, in plain sight of and but one mile from Houghton, the county seat. It has a tramway, stamp-mill, water front, and dock. The special master's report (page 820) shows the items of property, and the map at page 38 shows the situation with reference to the contiguous mines.

By an amendment to their bill complainants aver that their stock in the defendant mining company was all purchased in 1882 and 1883, prior to the 1st of April, 1883, and that their suit was not a collusive one to confer jurisdiction. (Record, pp. 822–842.)

This averment as to date of purchase of stock is sustained by the proof. (Record, pp. 66, 433, and 898.)

After the expiration of the charter, as admitted on all hands, the business was carried on precisely as before, prior to, and subsequent to the admitted time of knowledge of the expiration of charter. President Perkins says (page 884): "I did not know until February" (1884), and he says he did not know before because it was not thought by the counsel best to be mentioned, and that then he learned that Mr. Demmon had known of it three or four months before, and he presumes they knew it at the time of the assessment of 1883.

The report shows that during that year, after the expiration of the charter, the business of the surface-work, mining, exploring, sinking shafts, driving drifts, and all the other business was carried on precisely as before, at an expense of at least a quarter of a million of money, and that nearly $600,000 of business was done. Among the receipts was $88,000 for assessments on stockholders, made after the expiration of the charter. (Record, pp. 578, 580, and 582.) Secretary and Treasurer and Director Demmon says that after he discovered the expiration of the charter he made no change in the manner of conducting the mining operations, and that he proceeded to levy assessments thereafter. (Record, p. 343.)

POINTS.

We contend—

I. *That the attempted transfer to the Pewabi Copper Company by the board of directors of the Pewabic Mining Company was void on two sufficient grounds—the one that it was ultra vires, the other that it was fraudulent.*

II. *That all the acts of the board of directors in carrying on the business after the expiration of the charter, April 4, 1883, were ultra vires, and that even if they acted in good faith they are responsible for losses and expenditures incurred and made in that business.*

III. *That through the acts and conduct of the secretary and treasurer, Demmon, in whose hands the whole management of the board was suffered to rest, the defendant directors are chargeable with bad faith in their dealings with stockholders, and must be held on that ground to an accounting.*

I.

THE ACTION OF THE OLD COMPANY CONVEYING ITS PROPERTY WAS VOID.

Since the decree and appeal in this cause the supreme court of Michigan has construed the laws of that State bearing on this controversy by a judgment rendered in January, 1889, and reported in 41st N. W. Reporter, 426, *Attorney General* vs. *Perkins*.

These defendants, after this appeal, under an amendatory act of the State Legislature passed in 1887, attempted to do substantially what had been prevented by the proceedings taken in this cause. *Quo warranto* proceedings were taken in the supreme court, and on a full review of the law and the facts in this case it was decided that after 30 years of life corporate existence could not be extended against dissentient stockholders. If anything were needed in addition to the language of the act quoted in the above opinion of Mr. Justice Matthews, which permits three years' additional time for liquidation, this judgment is conclusive upon the point that this statute is merely a method provided to administer upon the affairs of a dead corporation. (See Chief Justice Parker in *Foster* vs. *Essex Bank*, 16 *Mass.*, 245.)

The provisions of the Michigan constitution are as follows:

Article 15, § 10. "No corporation except for municipal purposes, or for the construction of railroads, plank roads, and canals, shall be created for a longer time than thirty years."

Article 19, § 9. "The charters of the several mining corporations may be modified by the Legislature in regard to

the term limited for subscribing to stock and in relation to the quantity of land which the corporation shall hold, but the capital shall not be increased nor the time for existence of charters extended."

The Pewabic Mining Company was organized under the general law permitting the formation of such corporations by filing articles of association with the secretary of state and county clerk, and limits the period of existence to thirty years.

Although the following statute was not complied with by the defendants in their new organization, and although it is completely disposed of for the purposes of these corporations by the decision of the Michigan supreme court above cited, yet it cut a figure in construction at circuit; and we cite it to complete the statement of laws possibly affecting the questions involved. (How. Comp., § 4904.)

"SECTION 1. The people of the State of Michigan enact that it shall be lawful for any corporation organized under the laws of this State for mining or manufacturing purposes, whose corporate existence is about to terminate by limitation of law, at its annual meeting next preceding or at a special meeting called for that purpose, to be held within one year immediately preceding the date of such termination, by a vote of two-thirds of its capital stock, to direct the continuance of its corporate existence for such further term, not exceeding thirty years, as may be expressed in a resolution for that purpose. Upon the adoption of such resolution by the stockholders it shall be the duty of the president and secretary to make, sign, and acknowledge duplicate articles of association (as in the case of a new corporation), to which shall be appended a copy of the proceedings of such stockholders' meeting, certified by the secretary and verified by his oath, which articles of association shall be filed with the secretary of state and with the county clerk of the county where the corporation carries on its business, and be by them recorded in their respective offices at the expense of said corporation, and the copies so filed, the record thereof, or a certified copy of either of such records, shall be *prima facie* evidence of the facts therein recited.

"SEC. 2. Upon the expiration of the time limited for the existence of such old corporation a new corporation shall be deemed to be formed by such articles of association, which shall at once succeed to all the property and rights of action of the old corporation, and shall be liable for all of its debts or other obligations, and the officers of the old corporation shall succeed in like offices in the new corporation, and every stockholder in the old corporation shall be to a like extent a stockholder in the new corporation."—*Act of* 1882.

The scheme attempted to be put through presents these features:

(*a.*) It proposed to sell property of the value of $500,000 for $50,000 in the stock of the new company; it forbade competition, and its theory was to prevent realization for liquidation.

(*b.*) It offered to the dissentient stockholders who had paid their stock indebtedness, new assessable stock, liable as $50,000 is to $1,000,000—*i. e.*, at $1.25 per share paid by the conveyance of property, but indebted $23.75 per share.

(*c.*) The alternative proposition to dissentient stockholders was to take their *pro rata* in cash of the arbitrary valuation of $50,000—*i. e.*, $1.25 per share.

(*d.*) With all the assets conveyed to the new company, it left the old corporation in liquidation as to creditors, and stockholders liable for assessments to pay its debts.

(*e.*) It proposed a conveyance by the directors who had managed its affairs for five years and upwards to themselves, to be formally executed and to be formally received by themselves.

(*f.*) That the charter expired a year previously, and this fact, after it was admittedly known and when it was be-

lieved that the stockholders were ignorant of it, was kept from the stockholders until shortly before the meeting at which the attempt was made (Record, pp. 890, 918; President Perkins, 884), and that the stock voted at the meeting in favor of it by proxies held by the directors to whom the property was to be conveyed. (Page 895.)

We submit that the relation of the stockholder in corporations of this nature is in contract. He agrees with his fellows that he will join the venture, to be carried on for not longer than thirty years, and that then the assets shall be sold for the best obtainable price, the debts be paid and net proceeds divided, and that they shall part company.

There is no case holding that such a stockholder can be forced into a new enterprise, or that he can be compelled to receive anything else than his honest *pro rata* as a distributee of the fair value of the assets in cash. There is no difference between his position in this regard and that of a creditor of a dead man's estate or of an insolvent estate of a partner whose firm is in liquidation. To force him into a new company and a new contract is even beyond legislative power. No case can be found of the enforced renewal of a corporation not engaged in business affecting the public interests.

The law does not fix the term of the corporation. The corporators alone can do that.

In *Utley* vs. *Donaldson*, 94 *U. S.*, 47, the Court says:

"There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. It is as indispensable to the modification of a contract already made as it was to making it originally."

In *Clearwater* vs. *Meredith*, 1*st Wall.*, *pp.* 25, 39, 40, 41, where a consolidation of railroad companies authorized by

the statute was attempted against a dissenting stockholder, this Court says:

"There was no power to force him to join the new corporation and to receive stock in it.

"If the majority of stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined.

"But in conferring authority the Legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Even if the Legislature had manifested an obvious purpose to do so, *the act would have been illegal, for it would have impaired the obligation of the contract.*"

Morawitz, 1, § 415, correctly states the rule as follows: "On the winding up of the business of a corporation the proceeds must be distributed in cash." The business cannot be disposed of in any other manner except by unanimous consent. (McCauley *vs.* Myers, 44 Pa. St., 535; Black *vs.* Delaware Co. 24 N. J. Eq., 455; Re Co. L. R., 4 Eq., 341; Clinch *vs.* Financial Co., L. R. 4, 117; Frothingham *vs.* Barney, 6 Hun., 366, S. C., 13 N. Y.; Gregory *vs.* Patchet, 33 Beavan, 595.)

In *Tuttle* vs. *Michigan R. R.*, 35 Mich., 249, and also a consolidation case, the court says that a stockholder cannot "be brought into any other contract relations in any way not contemplated by the contract itself. * * * No change in the corporation which violated any of the statutory conditions could bind a dissenting stockholder or compel him to submit to the new order of things against his will."

In *Mowrey* vs. *R. R.*, 4th Bissel, 1886, the court says, regarding a consolidation: "Everybody knows that if several men enter into a valid contract it cannot be fundamentally altered except by unanimous consent. Why should a different rule prevail between incorporators?"

It is a familiar principle that no amendment to articles of association affecting a fundamental change in the enterprise or business is within the power of the parties or of the

Legislature to authorize as against a non-assenting stockholder, although the majority may accept. (Joy *vs.* Plank Road Co., 11 Mich., page 171; Detroit *vs.* Detroit Co., 43 Mich., 140, and Black on Constitutional Prohibition, page 46, note; page 54, note.)

"Corporations like this are in truth little more than private partnerships," says the vice-chancellor in Foss *vs.* Harbottle, 2 Hair, 491.

The defendants rely upon the case of Tredwell *vs.* The Salisbury Co., 7 Gray, 363. So far as that case lays down any principle, it makes for our contention (pp. 393, 397, and 405). It may be distinguished from this case as follows: There the bill was filed by an executor to obtain the instruction of the court as to accepting shares in the new company, and was not to set a conveyance aside.

There was no dissenting stockholder. The selling company was a live corporation.

The sale was shown conclusively to have been for a fair price.

Provision was made for any stockholder who desired to receive cash.

The sale, as appeared by the evidence, was not by the directors to themselves, but to another and also a live company. By the law of its constitution the corporation had authority to sell and transfer its property or franchises.

In the case of *Howe* vs. *The Boston Carpet Co.*, 16 Gray, 493, referring to the Tredwell case, the court says that "the legality of the transaction could not have depended upon the intention of the corporation to wind up its affairs immediately. If it had taken the stock in payment for goods or for the sale of the building or land or water power which it did not want or desire to sell while it still carried on its business, the act must have been equally legal;" so that we say that the Tredwell case simply holds that a living corporation may sell property for stock in another corporation with a view to distributing the same and not permanently holding it; this is familiar doctrine.

The directors become trustees at the expiration of the charter. (Bliss *vs.* Mattison, 45 N. Y., 22; Butts *vs.* Woods, 37 N. Y., 317; Thornton *vs.* Marginal Co., 123 Mass., 34; Foster *vs.* Essex Bank, 16 Mass.; Simmons *vs.* Hanover, 23 Pick., 194; Crease *vs.* Babcock, *Id.* 334, and see 8 Pet., 281; Greenwood *vs.* Freight Co., 105 U. S., 13; National Bank *vs.* Colby, 21 Wall., 609, 615.) Civilly dead, the property of an insolvent corporation is administered as a trust fund (Mellen *vs.* Iron Works, 131 U. S., 352) and a case where the charter was taken away, See Linn *vs.* Robertson, 6 Wall., 277.

And it was their duty to convert assets into money, pay debts, and distribute the net proceeds.

In addition to cases heretofore, see Marion *vs.* Butler, 2 Barb. Ch., 362; Blatchford *vs.* Ross, 54 Barb., 42; H. and N. H. R. *vs.* Crisute, 5 Hill, 383, 386; Simpson *vs.* Directors, 8 H. L. Cas., 711; Lynde *vs.* Eastin, 36 Beavan, 19; E. R. C. *vs.* Vanderbilt, 12 N. Y. S. C. (5 Hun.), 124; McCary *vs.* Junction, 9 Ind., 338; State *vs.* Bailey, 16 Ind., 46; Kerr on Injunctions, 558; Campbell's case, L. R., 9 Ch., 1 (S. C., 8 Eng., 678); 2 Perry on Trusts, 2d ed., § § 768, 769; Ringold *vs. Id.*, 1 Harris and Gill., 11, 25; Russell *vs. Id.*, 36 N. Y., 581; Ion *vs.* Davenport, 3 Hill, 373; Taylor *vs.* Earle, 15 N. Y. S. C., 8 Hun., 1; Davis' Appeal, 14 Pa. St., 371.

It makes no difference that the trustees act in perfect good faith, and actually for the interest of all the stockholders. (Gardner *vs.* Ogden, 22 N. Y., 327; Swayze's Appeal, 5 Pa. St., 377; Hunt *vs.* Perkins, 1 Harris and Gill., 81; Frothingham *vs.* Barney, 13 N. Y. S. C., 6 Hun., 366.)

A dissenting stockholder may have a receiver to dispose of the property, and may recover the value of his stock.

In the last case above, *Frothingham* vs. *Barney*, Wells, Fargo & Co. dissolved and sold to a new corporation of the same name for stock, in a very advantageous and profitable attempt to perpetuate the old company in a new one, but a receiver was appointed at the instance of a small stockholder. (See also Palmer *vs.* Williams, 24 Mich., 328; M. C.

and L. M. *vs.* Drinker, 30 Mich., 124; Bradley *vs.* Tyson, 33 Mich., 337.)

Aside from the question of power and aside from other indicia of unfairness, the attempt of defendants was to sell to themselves. In other words, the vendor, trustee, and vendee are the same person. It is doubtful if there could be a stronger case for the application of the principle than this one, where the sale attempted was for an amount one-tenth the value as reported by the master. Actual fraud, however, need not be shown. The defendants were disabled from promoting or becoming incorporators in the new corporation to take the assets of their beneficiaries.

If the majority sell to themselves they must account for the fair value. "They cannot bind the minority by fixing their own price upon the assets." (Ervin *vs.* Oregon R'w'y Navigation Co., 20 F. R., 577.) This was a scheme substantially like the one under consideration. (Brewer *vs.* Boston Theatre, 104, Mass., 378–395; Hodgkinson *vs.* National Bank, 26 Beavan, 473; Atwood *vs.* Merryweather, L. R., 5 Eq., 464, note.) In Gregory *vs.* Patchett, 33 Beavan, 539, which was a conveyance to directors, the conveyance was held void and the directors held liable. (Wardell *vs.* R. R. Co., 103 U. S., 651; People *vs.* Township of Overysel, 11 Mich., 222; F. and P. M. R. R. Co. *vs.* Dewey, 14 Mich., 477, 486; G. A. Sem *vs.* Keifer, 43 Mich., 105; Great Luxemburg R. W. *vs.* Magnay, 25 Beavan, 586; S. C., 23 Beavan, 646; York and N. M. R. R. Co. *vs.* Hudson, 16 Beavan, 505; A. G. *vs.* Nelson, 1 Craig and Phillips, 271; Benson *vs.* Hathorn, 1 Young and Collier, 325; Aberdeen R. W. Co. *vs.* Blakie, 1 McQueen, 482; M. C. Ass'n *vs.* Coleman, L. R., 6 H. L. 189; *Re* Madrid Bank, L. R., 2 Eq., 216; Kochler *vs.* Iron Co., 2 Black, 715; James *vs.* R. R. Co., 6 Wall., 752; Drury *vs.* Cross, 7 Wall., 299; Coal and Iron Co. *vs.* Sherman, 30 Barb., 553; Abbott *vs.* Amer. H. R. Co., 33 Barb., 586; Simmons *vs.* Vulcan Oil

Co., 61 Penn. St., 202; Kimmell *vs.* Gutney, 2 Grant's cases, 125; Ashurst's appeal, 60 Penn. St., 290; 1 Redfield R'y, 5 ed., 605 to 613; Robinson *vs.* Smith, 3 Paige, 222; Colquitt *vs.* Howard, 11 Ga., 566; Hodges *vs.* N. E. Screw Co., 1 R. I., 312; Port *vs.* Russell, 36 Ind., 360; Newby *vs.* O. C. R. R., 1 Sawyer, 63; Michand *vs.* Girod, 4 How., 503; C. R. *vs.* Clough, 49 N. H., 257; Heath *vs.* Erie R. R., 8 Blatchford C. C., 347; Wright *vs.* Orville M. Co., 40 Colo., 20; E. & N. R. R. *vs.* Poor, 59 Maine, 277; Paine *vs.* L. E. R. R., 31 Ind., 203; Goodwin *vs.* Cinn. Canal Co., 18 Ohio, 126; Story Eq., §§ 1255 to 1257 and 1265; G. C. & S. R. R., *vs.* Kelly, 77 Ill., 426 and 435, cas. cit.; Butler *vs.* Watkins, 13 Wallace; Green's Brice's Ultra Vires, chap. VII.)

JURISDICTION TO APPOINT RECEIVER.

Of the jurisdiction and frequent application of the power of the Court there is no question.

While it is entirely true that the receiver will not be appointed during the life of a corporation to deprive the directors of their discretionary powers in respect of the corporate business, yet, as we have seen, they are no longer a corporate board, but are trustees who have failed in, neglected, and mismanaged their trust. Their duties as trustees are imperative, and cannot be varied or added to or escaped. As such they and the funds in their hands are subject to the control of the court of equity.

Formerly the power in Michigan was statutory. The court, upon the application of any creditor, stockholder, or member, might appoint a receiver or trustee to wind up the business (as in New York; see Bank *vs.* Alpina, 39 Mich., 706). A law still stands (2d Howell, sec. 8208, 39 Mich., 707) providing that suits may be proceeded with in the corporate name or in the name of receivers or trustees as substituted plaintiffs.

Jurisdiction in chancery is also expressly conferred (2d

Howell, sec. 8150), and this statutory jurisdiction may be exercised by United States courts. (Ellis *vs.* Davis, 109 U. S., 485–498; Dodge *vs.* Woolsey, 18 How., 331–341; Zebriskie *vs.* C. C. & C., 23 How., pp. 381, 395, 400.) It is said in the last case, "but the bill is framed not to obtain relief from error or fraud in the administration of the powers of the company by their trustees, but against the exercise of powers that do not belong to the corporation and which the body could not confirm except by unanimous consent."

Now, in such cases all English and American authorities are to the effect that a single stockholder may maintain a bill for an injunction and receiver even during the existence of the corporation, and without first requesting the board of directors to bring the suit. In Heath *vs.* Erie R. R. Co., 8 Blatchford, 347–393 down to 407, the cases are exhaustively analyzed by the learned court.

The cases like Foss *vs.* Harbottle, 2d Hair, 461, are not now followed, even in England. (See Gray *vs.* Linn, L. R., 8 Eq. Cas., 541; Atwood *vs.* Merryweather, 5 Eq. Cas., 464—a case much resembling this one; McDougal *vs.* Gladwin, 1 Chan. Div., 21; Mason *vs.* Harris, 11 *id.*, 97. See Thompson on Liability of Directors, 382 to 394 and cas., Perry on Trusts, sec. 242; 2 Story Eq. Jur., §§ 1232, 1252; Peabody *vs.* Flint, 6 Allen, 52; Mumma *vs.* P. Co., 8 Pet., 285; Curran *vs.* State, 15 How., 311; Bacon *vs.* Robertson, 18 How., 480; Linn *vs.* Roberts, 6 Wall., 277; Briggs *vs.* Penniman, 8 Cow., 387; McLaren *vs.* Pennington, 1 Paige, 111; Heath *vs.* Barmore, 58 N. Y., 305; Pond *vs.* Vermont R. R., 12 Blatchford, 280, 287; Foster *vs.* Essex Bank, 16 Mass., 245.)

It being true that courts of equity will interfere in the internal management of affairs of a corporation at the instance of stockholders, where the matter complained of is *ultra vires*, it seems to us clear that after dissolution and after the ultimate governing body of the stockholders have ceased to have power to carry on business and nothing remains but

to hold administration upon the assets of the dead corporation, a court of equity in the circumstances of this case will lay hold of those who are in actual possession of the assets and administer them by its own officers, upon the same principle upon which courts of equity act in administering assets of a deceased natural person, upon the principle that it is the duty of the court to enforce the execution of trusts.

While rule 94 in equity, 104 U. S., IX, has no application to the present case, nor the case of Hawes *vs.* Oakland, in the same volume, page 451, the decision (pages 454 down to 459) is valuable upon the general doctrine and its limitations, as cited above, and which is discussed by the learned court in the 8th Blatchford, 347 to 407, above cited.

Boone on Corporations, sec. 207, cas., note 8; sec. 206, cas., note 3.

Field on Corporations, pp. 420–425.

II.

THE ACTS OF THE BOARD IN THE EXPENDITURE OF THE MONEY IN CARRYING ON BUSINESS AFTER THE EXPIRATION OF THE CHARTER APRIL 4, 1883, WERE BEYOND THEIR POWERS, AND THEY ARE RESPONSIBLE FOR ALL LOSSES AND EXPENDITURES IN THAT BEHALF.

In *Gray* vs. *National S. S. Co.*, 115 U. S., 116, this Court says of the steamship company in liquidation: "It could no more own and manage a steamship than it could own or manage any other property."

It being true that the form of the corporation existed only for the purpose of liquidation, and that the directors were trustees for that purpose, we cannot see why all the liabilities of trustees are not attached to them.

If a receiver, executor, or insolvent's assignee should carry on the former business of the estate being administered, he would be chargeable with every dollar lost and liable for

every dollar made. If a liquidating partner in merchandising should buy goods for sale again and a loss should accrue, or if he took any venture whatever with the funds of the firm, he would be chargeable, and this no matter how good his intention and that his honest object was to increase the fund.

The risks of mining business are in keeping up the equipment when no ore is in sight and in drifting, stoping, and sinking in such circumstances. In this case it is clear that about $250,000 was expended after the expiration of the charter in all the risks of the business. Whatever portion of this was expended in keeping the mine in proper condition, pumping water or preparing the property for sale, would be an ultimate charge for the trustees to be deducted; but, conceding their good faith, this can be no exception to the universal rule of liability for the money lost.

Hill on Trustees, Am. notes, p. 580.

It is well settled that officers are liable for losses occurring by acts *ultra vires* even during the corporate life.

Thompson on Liability of Officers of Corporations, p. 375.

Field Corporation, sec. 178.

Parrish *vs.* Wheeler, 22 N. Y., 503.

Even if it were true, ignorance of the expiration of the charter would be no defense. While the law is different as to by-laws, there never has been a question that every one is conclusively presumed to know the provisions of the charter or articles of association of the corporation with which he deals.

Angell and Ames on Corporations, sec. 299.

Green's Brice's Ultra Vires, p. 397 *et seq.*

If the general rule were otherwise it would in the nature of things have its limitation before a director, an executive

limb of the corporation, could defend himself on the plea of ignorance of the organic law creating the body. Ignorance of law does not entitle a party to relief.

Perry on Trusts, sec. 184.

The place for filing original articles was accessible to all in public offices at the State capitol and within a short distance of the mining office.

The business carried on is shown by the statement of the superintendent and treasurer, pp. 578, 582, and it appears that after the expiration of the charter and after actual knowledge of the expiration in the board the stockholders were assessed and paid in over $80,000.00, and, as we have seen, all the defendants admit the affairs of the concern were carried on in every respect as during the life of the corporation.

On this ground alone there should be an accounting and a receiver.

III.

THERE SHOULD BE AN ACCOUNTING AND A RECEIVER BECAUSE OF THE BAD FAITH OF THE MANAGEMENT WITH WHICH ALL OF THE DEFENDANTS' DIRECTORS ARE CHARGEABLE AND BECAUSE A DISCOVERY OF ASSETS IS REQUIRED.

It appears by the evidence that Mr. Demmon was permitted to have the sole management of the companys' affairs, and that no other of the board charged himself with any duties or acquired any actual knowledge of the business or of this managing director's transactions.

President Perkins' testimony, pp. 880, 882, and cross-ex., p. 882.

The other directors were not sufficiently interested to notice or remember any dissent from the action of the meeting which voted the transfer, although it appears by ad-

mitted minutes (pp. 5, 6, 7, 8, 43 to 45) to have been contested vigorously.

Perkins, p. 880; Buttrick, p. 877.

Mr. Demmon held the same office in the Franklin (adjoining the Pewabic) as in the Pewabic, and also in several other copper companies, and was engaged in no other business than as such officer of these companies. (P. 897.)

His acts and knowledge must be held to be the acts and knowledge of the defendants' board.

We select the following as some of the evidence tending to show bad faith:

1. The attempted transfer of $500,000 in value of assets for one-tenth of that sum, as heretofore detailed.

The consideration was less by nearly half than the amount assessed and collected of stockholders within the past six months; it was less by $25,000 than the amount of copper alone shown to be on hand on January 1, 1884, less than three months before; it was less than the value of the supplies at the mine alone (Record, p. 582). It was less than one-fifth of what had been paid out in cash of the stockholders' money on one piece of additional land less than five years before—p. 562.

Notice of the expiration of charter was confessedly withheld from stockholders, and the majority vote was obtained on proxies through circulars printing an alarming statement that the Quincy mine was endeavoring to wrest the property from the company. (Pp. 909, 910.)

(The president of the Quincy Company was put on the witness stand by defendants, but neither by his examination nor by any other evidence was there any effort to show a ground for this circular or to sustain the averment of the answer in that regard.)

2. No information had been given as required by law:

Howells Comp., § 4005, requires that annually a report shall be made and signed by a majority of the board of directors, containing, first, the amount of capital paid in; second, the amount invested in real estate; third, the amount of their personal estate; fourth, the amounts of their debts and credits; fifth, the name of each stockholder and the number of shares held by him at the time of the report," and further provides that "every such report shall be verified by the oath of the officer signing the same, and shall be filed in the office of the secretary of state and with the clerk of the county in which the mine is situated." It further provides for the pains and penalties of perjury for any false statement. This requirement is preserved in the later act, section 4107, adding other requirements for the report, and providing that it shall be filed with the county clerk and auditor general of the State, and providing that failure to file it shall be a misdemeanor, as in the prior act.

This is clearly a provision for the benefit of all persons interested in the corporation as stockholders or creditors, and it is not a provision merely for the purpose of taxation, there being a separate and independent provision for the filing of a statement for that purpose. (Howell, sec. 1189.)

No such report had been filed for five years prior to the meeting. (Pp. 899, 104).

The supreme court of Michigan terms this a beneficent provision and one of the conditions of the grant of a corporate franchise by the State. (Vannetten *vs.* Eaton, 19 Mich., 192.)

There was no equivalent for such a report furnished the stockholders.

The so-called annual reports show nothing of the whereabouts of the mine's product or what is invested of money derived from it or from assessments.

It is impossible to follow back balances or to get an understanding of expenditures for real estate, personal prop-

erty, or what has been received. Take, for instance, the report for 1883, p. 582. There is no statement of the personal property beyond the items of "copper on hand," "cash," and "supplies." The last does not include machinery, tools, horses, cars, wagons, &c., but is a technical term covering fuse, powder, and the like. Who can tell anything from the item "cash paid loans" or "mine agent's drafts?" If the mine agent's report of expenditures accompanying the statement agreed with his "drafts" it would be intelligible, but there is a difference of $100,000. The balance-sheet of assets and liabilities includes none of the live mine property.

In the search for information the managing director at the mine was examined on this report, and certainly he did not clear up matters. This is his testimony, page 253:

Q. You attended the meeting in Boston on the 26th of March, did you?
A. I did.
Q. Was it reported correctly that there was $53,828.42 on hand?
A. I suppose it is correct.
Q. Was it correctly reported that you had in copper on hand at 14⅞ cents per pound worth $75,066.99?
A. I presume so.
Q. Did it strike you as correct?
A. I could not tell. It was the treasurer's report.
Q. You were there. Did you see the report?
A. I was there.
Q. Does he make his figures from your reports—who sends the figures?
A. The clerk.
Q. Under whose direction?
A. Indirectly I give him——
Q. Indirectly you are responsible for it?
A. How could I tell whether he had the copper or not?
Q. Did you have the amount of copper on hand?
A. I do not know, sir. Nobody can tell that.
Q. Do you mean to say that your reports are made to the board of directors, from which these printed reports are made, and that the agent knows nothing about it?

A. We know that our figures are correct, but when they get down there we know nothing about them.

Q. Well, now I show you the report of the Pewabic Company of Jan. 1st, 1884, and ask you whether or not the item of copper on hand is correct, at 14⅞ cents per pound, $75,066.99.

A. I do not know.

Q. You say you don't know.

A. I don't know.

In the preceding year there are "mine agent's drafts" of $250,000 and "cash paid loans" $350,000. There are no assets shown except copper on hand, cash, and bills receivable, making a total of $141,000. (Record, p. 571.)

Taking the average of annual copper production from the evidence, since Mr. Demmon came into the directory, there has been mined and sold of copper $2,000,000.00. There has been collected from stockholders a large amount more, and there is no connected account anywhere that has been found.

3. The withholding of the books:

In their answer, the complainants having complained of a refusal to show them and having asked for information as to the business, defendants set up as a reason for not giving the information that the answer is sworn to in Michigan, and that the books containing the desired information are in Boston.

The complainant stockholders had made efforts to see the books prior to the filing of the bill.

Demmon, pp. 336, 337.

On March 31, 1884, the bill was filed, and on May 12 following the court made the order appointing the special examiner as to values, limiting both parties as to the time of taking testimony, complainants being given twenty-seven days in chief and six days to rebut. Complainants were residents of New York and were required to produce compe-

tent evidence of the amount and description of the property.

Every effort was made to get access to the books and was rendered futile by Mr. Demmon.

Complainant Smith's testimony, p. 68.
Mr. Mussy's testimony, pp. 74, 75.
Dickinson, p. 388.

The direction of the counsel for defendants in this case was disregarded.

Grant's testimony, p. 390, in connection with Demmon's, pp. 336 and 332.

After complainants' case was closed Mr. Demmon, in his Boston testimony, p. 879, stated that in the previous June, when examined at Houghton, he had certain books with him, and that he mentioned the fact in the presence of the examiner. A reading of his Houghton testimony, p. 330, discloses no intimation of the kind, although the contention of the complainants that he had withheld books was pressed vigorously upon him in his examination. Even in his Boston testimony he says that he brought no ledgers—nothing but cash books and day books, which would be practically useless in a limited examination before a master.

Under the order of the court to submit testimony as to the items of property a hearing was fixed at Houghton for June 10. Northrop, a stockholder of the Pewabic Company, p. 171, was requested by complainants' attorney to look over the personal property at the mine, that he might testify at the hearing. He was refused access to the necessary information. (Northrop's testimony, p. 165 *et seq.*)

The history of these efforts to obtain testimony after the order of the court in the premises stamps the conduct of the directors in charge with bad faith.

4. The diamond-drill exploration of the Pewabic land and the use made of it as bearing on the question of value :

The defendants' theory was that the mining land situated on the Pewabic lode between the Quincy and the Franklin was practically worthless.

To demonstrate this they had introduced a mass of testimony tending to show extensive explorations by the diamond drill, and in connection therewith put in the schedule showing 23 borings (Record, p. 584), all purporting by the testimony to have been of recent date, aggregating 1,846 feet. Of course, the value of this testimony as to the presence or absence of copper in the land depended upon its having been lately done, for the reason that the levels and drifts are soon carried to the point of any discovery made by the drill; as, for instance, if all these borings had been made one year previously, the report of the mining superintendent for 1883, at the close of the year, shows that the "drifting on different levels for that year had been 2,546 feet."

After the testimony and this schedule had gone in with the conclusion of the mining superintendent from such exploration that the land was poor, Thomas Whittle, the mining captain, who had charge of all such work, was put upon the stand. He had been mining captain for two years. (Record, p. 287.)

Having in mind that the bill was filed March 31, 1884, we beg to submit Whittle's cross-examination as to how and when the "explorations" were made.

During the two previous years the first of any diamond-drill explorations had been in March, 1884, and it was then used for twenty days, doing the last of it on the last of March. (P. 290.)

Q. Now, at what time did you cease using it?
A. The first time?
Q. Yes.

A. The end of March.

Q. Was that when the news came of the commencement of this suit?

A. Yes, sir.

Q. When did you commence to use the diamond drill again?

A. About the 21st of April.

Q. What were your instructions when you commenced to use it again, on the 21st of April?

A. To proceed on the long hole.

Q. What do you call the long hole?

A. We were drilling a hole for exploration from our main workings back east and we called it the long hole, and we ceased working when we had orders. That is the 32d level.

Q. When did you get your orders to commence again? What were your instructions?

A. To continue our work.

Q. Whereabouts were you instructed to continue your work?

A. At the 32d level.

Q. In the same long hole?

A. Yes, sir.

Q. Did you put the drill in the same place where it had been?

A. Yes, sir.

Q. How long did you continue that?

A. We continued that for two weeks.

Q. Then what did you do?

A. We stopped altogether.

Q. You haven't done anything since?

A. No, sir.

Q. How did you come to stop it?

A. According to orders from the agent (Vivian).

Q. How many holes did you put in between the 1st of April and the end of the two weeks?

A. Only that one.

Q. In the same old hole?

A. Yes, sir

Q. How many feet did you bore?

A. About 280 feet.

Q. Now, I understand that you commenced another boring after the 21st of April; that is clear?

A. That is clear, sir.

Q. Did you change the direction of the drill in any way?

A. No, sir.

Q. Now, you had been boring some 20 days before ordered to stop, in March, had you?

A. Yes, sir.

Q. How many holes did you put in during these 20 days?

A. We put in nine holes.

Q. In what levels?

A. At the 30th level, north of the shaft, three holes—two east and one west.

Q. How deep?

A. The first hole, 98 feet; the second hole, 59 feet west; third hole, 63 feet east; fourth hole, south of shaft at the 30th level, 82 feet east; fourth hole, north of number six shaft, 96 feet east.

Q. What level?

A. The 34th level (the lowest level). Fifth hole, 56 feet west, north of number six shaft; sixth hole, south of number six shaft, east 91 feet; seventh hole, in the 31st level, 97 feet; eighth hole, 32d level, east 412 feet, south of the shaft.

Q. Do I understand that the drill-hole went across the levels?

A. Yes, sir.

Q. Through to ground that had been worked—where the levels had been worked before?

A. In the same ground.

Q. This long drill-hole, then, ran or passed all the ground that had been worked in the levels up to nearly the 19th?

A. At the 21st level.

Q. In what general direction lies the Quincy from the point at which you started your levels?

A. Here is the Quincy mine here (indicating on the map).

Q. Have you at any time put in a drill-hole from the end of any level or cross-cut towards the Quincy mine?

A. We have put one drill-hole through up here—not a diamond drill-hole.

Q. I am asking about your diamond drill-work?

A. No, sir.

Q. Have you put in any drill-hole from the end of any level or cross-cut in the direction of the Franklin mine?

A. Yes, sir—oh, no, sir; only a cross-section. (Pp. 291, 292.)

The explorations before suit, therefore, were made in March, and were nine instead of twenty-three in number, and the exploration after the investigation as to value was commenced was continuously in one hole, through worthless ground, and not in the direction of the contiguous rich lands of the Quincy and Franklin.

All the circumstances show the propriety of an investigation both of the accounts and of the property, and they certainly show that the attitude and conduct of those heretofore in actual charge of the affairs of this company towards the stockholders are not in accordance with their duty as trustees. If these circumstances justify the want of confidence of the *cestuis que trust* in the management, then this appeal to a court of equity to take charge through its officers is justified.

We submit that the decree should be reformed, by directing the appointment of a receiver, by adjudging the directors and trustees liable for losses and expenditures incurred outside of their duty as liquidators, and by an order for accounting, and that in other respects it should be affirmed.

DON M. DICKINSON,
ALFRED RUSSELL,
Of Counsel.

Supreme Court, U.S.
FILED,
DEC 13 1889
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 240.

THE PEWABIC MINING COMPANY et al., APPELLANTS,
vs.
THOMAS H. MASON et als.

No. 168.

THOMAS H. MASON et al., APPELLANTS,
vs.
THE PEWABIC MINING COMPANY et als.

Brief for the Appellants in 240; for the Appellees in 168.

THOMAS H. TALBOT,
Counsel for Pewabic Mining Company et als., Defendants below.

BOSTON:
PRINTED BY NATHAN SAWYER & SON,
No. 70 STATE STREET.
1889.

[Against the Sale Decreed, and for Ascertainment otherwise of the Value of Complainants' Shares, which the Defendants are ready to pay.]

Supreme Court of the United States.

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Brief for the Appellants in 240; for the Appellees in 168.

HOW THESE CASES CAME HITHER.

The Pewabic Mining Company, the chief defendant in this case, was a corporation for mining purposes, chartered under the laws of the State of Michigan, April 4, 1853, for a period of thirty years, — that is, to April 4, 1883; its mine being situate at Hancock, in the County of Houghton in that State, while its office for general business, allowed by law to be outside the limits of Michigan, was in the city of Boston, Mass. The present management came into its control after the great fire in Boston of 1872; and the only stockholders' record, preserved from that fire, began — apparently as of the origin — in March, 1859,* which commencement would imply a continuance until 1889.

* Record, pp. 333, 849.

That the charter period did continue till the last-named year, was the impression of the managing officer, the defendant Demmon, until November, — say 7, — 1883* (earlier statement assigning August of that year being plainly incorrect).† Then the question arose first in the mind of the counsel of the company located at Houghton (J. H. Chandler, Esq., now of Chicago), and he ascertained the fact from the county records at Houghton.‡

Up to that time the directors, the individual defendants, had conducted the affairs of the corporation as though the corporation were still in full corporate life.

Upon ascertaining this fact of the expiration of the charter, this counsel appears to have gone forward of his own motion towards a re-incorporation. He consulted able Michigan counsel to be found at Detroit. The application for advice, and the advice obtained, and the directions given, are fully stated by the counsel.§ Meanwhile, in this matter, the directors did "nothing at all."‖

Upon the subject of the renewal of corporate existence, the then condition of Michigan law was this, in brief: From the beginning it had been open to such companies to extend their corporate existence by the individual action of the shareholders of the expiring or even expired corporation. That is, a portion of them, — three were enough, — by filing the proper papers, could constitute themselves into a new corporation; and when the property of the old corporation should be transferred to the new corporation, the renewal would be practically secured. The shareholders in the old, of course, would guard their individual rights in the conditions of their transfers. It was a simple matter: make the number of shares in the new corporation exactly the same as in the old, and then give to each person surrendering any number of shares in the old corporation, the same number in the new: and the thing is accomplished: a new period of corporate existence obtained for the old shareholders, each with his old number of shares: those being still shares in the same property, real and personal, as before. An instance of such renewal is shown in this case, a splendid instance, —

* pp. 850, 851, 913.
† p. 334.
‡ pp. 912–919, especially 915.
§ pp. 912–919.
‖ p. 890.

that of the "Quincy Mining Company; incorporated by special charter of the State of Michigan, March 30, 1848: re-organized under the mining law of the State of Michigan, March 6, 1878."*

It will readily occur to the Court that this method of renewal — that is, by disintegrating the old corporation, and resorting again to individual action — was too inconvenient to be the sole method when corporations should become numerous and involve large interests. And when the mines of Michigan had drawn large amounts of capital into her corporations, her Legislature proceeded to make more liberal provision in this respect, — to allow corporations, like this defendant, to renew their corporate existence by corporate action. This privilege was raised by an Act of March 14, 1882. A two-thirds vote was required; but, as plainly appears, that made no difficulty against the renewal of this corporation.

The difficulty — and that was insuperable — was, that the renewal must be resolved, voted, during the continuance of the charter period.† The lapse of the charter period, in innocent oversight, as before stated, made it impossible for this corporation to comply with this condition, at any time after April 4, 1883.‡ But the legislation of 1882 had not taken away the old inconvenient method of renewal by individual action, for which it had provided a more simple and easier substitute. And these director defendants were, by skilled and able counsel, advised to resort to this, then antiquated, method.§

This method, it will be seen, involved a form of sale of the corporate property. And if there was to be a form of sale, a mere formal sale even, there must be a nominal price. Nothing more than a nominal price was necessary, no real sale being contemplated.

The stock market of Boston — and there is no other regular market for copper stocks in the United States‖ — afforded the most obvious valuation of that corporate property. It had been, for years, daily bought and sold in the shares in its stock, and had been bought or sold in no other way. The price had been published in the newspapers and in the stock reports, and was matter of such record. What more natural, whether absolutely

* p. 902.
† The Statute: and see Record, pp. 850, 919.
‡ Above Statute: and see p. 850.
§ pp. 850, 919.
‖ pp. 66, 71, 422, 423.

correct or not, — what more natural and innocent, than that these directors should look to that actual market value as the value which should be used in this formal transfer, this assignment from each shareholder to himself, as these directors contemplated and intended? And without thought that there was to be any actual sale or transfer of any of these shares, without knowledge or expectation that any shares would be actually sold, they valued them at the going market rate, $1.25,* which gave an aggregate value for the whole corporate property of $50,000 over and above the debts, some $30,000 or $40.000 more,† — a gross value above $80.000.

But the complainants invoked the aid of a Court of Equity against this transfer, alleging their unwillingness to enter the corporation to be created, and that the price to be paid to them for their shares on their withdrawal was inadequate; and finally, to the end that the corporation should be brought to an absolute end, and all the corporate property should be divided among all the stockholders, they prayed that all the corporate property might be sold for cash.

The whole number of shares is 40,000.‡ The complainants own 2,650.‡ a little more than five-eightieths, one-sixteenth, of the whole number.

To some extent, the Court below found the equity of the case to be with the complainants — a constructive equity rather than an actual: constructive so far, at least, that it involved no intentional iniquity, no wilful or even purposed want of equity, whatever in any action of the defendants. And under conditions which recognized and rested on the good faith of the defendants, a sale was ordered. From the decree thus largely in their favor, probably from the recognition, by a portion, or rather by the pervading spirit, of the decree, of the good conduct and general good faith of the defendants, the complainants appealed to this Court, as appears in Case No. 168.

The defendants also appealed, because they deemed their action wholly justifiable in equity; and they regarded the order for a compulsory sale, on the request merely of a very small number of their fellow-shareholders, as a great injury and grievous iniquity to themselves, unjustified by any actual neces-

* pp. 810. 812. † p. 881. ‡ p. 4.

sity of the case, even if the rights of the complainants be as the Court below regarded them. Thus Case 240 is before the Court.

With this explanation of the presence of these cases in this Court, other facts important to the discussion may be left for statement when reached in order in the "Argument upon the Merits:" to which this brief presently passes.

The whole controversy in these two cases is of the re-organization of the shareholders of a mining company, under the laws of Michigan, after the expiration of the period of its earlier and first incorporation. The complainants, as before stated, represent one-sixteenth and a little more of the stock. This number cannot, for the purpose of this hearing, be increased by the statement that other stockholders would have been complainant if their presence as parties would not have endangered the jurisdiction of the Court below over this suit. The jurisdiction invoked by this suit can be exercised only over those who have been made subject to that jurisdiction by the Constitution of the United States, and, further, only over persons who are actually parties before the Court in the suit; not at all over those whom the Constitution has forbidden to become such parties. The defendants represent all the rest,— two-thirds of the shares by active concurrence and expressed approval and consent,* and the rest by tacit assent.

These appellants do not here raise objection to this much of the opinion which is the basis of the decree appealed from; to wit, that they cannot "compel disputing stockholders to continue in the business," nor "compel all the stockholders to accept interests in the new enterprise in exchange for their shares in the old," nor "impose arbitrary and unfair terms and conditions upon them for refusing to do so." †

If there is in the case an appearance of their having done so, it is appearance merely,— a constructive, not an intentional, want of equity,— as will immediately be shown, in the very opening of the

ARGUMENT UPON THE MERITS.

Facts.

For the whole question, which the counsel for the defendants here proposes to argue, is of the method of relief which is to be afforded to these complainants. The defendants

* R., pp. 7, 8. † pp. 921, 922.

object to so much of the decree as directs the special master to sell the property and assets of the Pewabic Mining Company "at public vendue to the highest bidder in one body."

They object because (1) such sale is not necessary to the securing to the defendants all their rights as dissentient shareholders; (2) such sale will be very injurious to the rights and interests of the defendants.

They further object to the direction of a sale of the whole "in one body." This matter should be left open for further consideration by the Court below.

The defendants ask that the usual method of relief granted to such dissentient stockholders as these complainants may be followed in this case: that they themselves being required by the Court below to secure to the complainants the payment of the value of their shares when ascertained by that Court, they shall, upon the giving of such security, be allowed to complete the proposed transfer of said property; in other words, the payment to the complainants of the value of their portion in money, which they pray for, being judicially secured to them, that the control of the rest of the property should be left in its owners, the defendants.

The complainants may have their portion of the common property. They may take the value of their shares. The defendants ask only that the complainants shall be required to take that value in the manner least injurious to the defendants. This is the extent of the defendants' contention in this Court.

And while nothing will be asked, in behalf of the majority of the stockholders, which this Court would not in equity be required to allow to them, even if their officers — especially without the collusion or knowledge of their constituents — had in some respects acted in bad faith towards the complainants, the method of procedure which will be urged upon the Court in behalf of these defendants and their constituents will find re-enforced support in the entire good faith, not only of the constituents of these defendants, but also of the defendants themselves. Accordingly, our *First Proposition* of fact is this: —

THE DEFENDANTS ARE IN COURT WITH CLEAN HANDS.

The allegations of bad faith and misconduct which the complainants make against the defendants, as directors of the cor-

poration in full activity,* are not sustained by any evidence, and were not found true by the Court below. If true, they would have sustained the request in support of which they were made,— the request for the appointment of a receiver. And this request the Court below denied,† declining even to hear the counsel for the defendants argue the question of the good faith of their clients.

The Court also, refusing to hold the defendant directors liable for money received or expended after the expiration of the charter, denied the complainants' prayer against them for an account.‡

Further, the Court decreed costs against the complainants in favor of these defendant directors.‡

Besides thus recognizing the good faith of the defendants, the Court further sanctioned their conduct by attempting to provide for the complete execution of their plan of re-incorporation, if it should clear itself from its apparent inadequacy of compensation to the complainants. If, at the sale ordered, the highest bid received should not exceed the valuation fixed by the defendants, then there was to be no sale under the decree; but the transfer proposed by the defendants, with its accompanying scheme of re-incorporation, was to be completed under the direction and sanction of the Court.§ The record shows further evidence of good faith.

The manner in which the management was led into error as to the expiration of the charter period is fully stated by the erring officer.‖ and his statements have already been cited in this brief.

The discovery of the expiration of the charter by the corporation counsel, and his consultation of skilled counsel at Detroit, are shown by the letters of consultation and advice themselves.¶

And right here comes the crowning fact. So far from then planning or contriving any injury to these complainants, the defendants did not then know of the existence of these complainants as parties in interest in the matter under consideration. Here are the dates: —

November 1, 1883, Chandler, at Houghton, ascertained the date of the expiration of the charter of the Pewabic Mining Company.** On that day he wrote to Ashley Pond, Esq., of

* Bill, par. IX.: R., pp. 8, 9. † p. 846. ‡ p. 925. § pp. 922, 923; pp. 923, 924.
‖ pp. 333, 849. ¶ pp. 912–919. ** p. 913.

Detroit, stating the actual status of the company, and asking direction as to how its corporate existence might be renewed.*

November 5, 1883, Chandler communicated the ascertained fact of the expiration of the charter to Treasurer Demmon, and in general indicated the plan of renewal afterwards adopted.†

November 8, Pond fully formulated the plan in a letter to the law-firm at Houghton of which Chandler was the head;‡ and thus Chandler was then entirely qualified to take charge of the proceeding for re-organization.

It was February 8, 1884, and not before, that these complainants became on the books of the company large stockholders in the Pewabic Mining Company,§ and as such known to the treasurer, and through him to the other directors. Prior to that, only fifty shares had stood in their names on those books.‖

It was March 8 before the intended opposition of these complainants was sufficiently developed to induce the executive officer, Demmon, to call the attention of the stockholders thereto;¶ and then clearly he did not understand what form that opposition would take: there is not the slightest intimation that he understood that the form would be of opposition to the price at which the nominal transfer was proposed. It will be seen that his fear was, that parties interested in the Quincy Company would get control of the Pewabic; not at all that such parties would cease to be shareholders in the Pewabic.

Is it to be supposed without evidence, or upon any evidence to be found in this case, that these defendant directors, prior to February 8, 1884, formed a scheme to deprive these complainants of so few as fifty shares of this stock? Yet, down to that day, that was the whole interest of the complainants in this corporate property known to the directors defendant. Is there a particle of evidence that they changed their plan in any way between February 8 and March 26, in that year?

But the fact that these directors took the market price of the stock of this company is of itself incompatible with bad faith on their part. That is *prima facie* evidence of entire good faith in their action, even though, upon further examination, such market value may be shown to be not the true value.

* p. 917. † pp. 913, 917. ‡ p. 919.
§ p. 892. ‖ pp. 822, 71. ¶ p. 909.

The market value of this property on February 6 and 9, just before and just after these complainants became known as shareholders, was exactly $50,000 net.* On the day before the meeting at which the scheme for a re-organization was brought forward, it had risen some; and later it had gone down to $40,000 net.† Then (1) the price of copper was low;‡ and (2) the indications in the mine were very unpromising, and had been so for some time.§ The corporation was in debt $30,000 to $40,000,‖ 75 cents to $1 per share. The first thing the company would have to do, as soon as it gained corporate existence and legal authority to do any thing, would be to levy an assessment. And the sum of that assessment would be made up substantially as follows: (1) to pay off existing debts, $1; (2) to furnish capital for further operations, $1; in all, $2.

It is at once seen how strong the actual temptation to timid shareholders to get rid of their shares, then was. In view of the evidence now produced of the ultimate prospective value of this property, and of the ultimate promise of this enterprise, was there any plainer duty then pressing upon these defendants than the duty not to increase this feeling of timidity by offering above the market value of their shares to shareholders who should withdraw? It is this very feeling of timidity to which the managing officer, Demmon, addresses himself, in his circular of March 8, 1884. He endeavors to counteract it. He urges the stockholders "to hold on" "a little longer."¶

Whether the value thus fixed for shares to be withdrawn was correct or incorrect for the purposes of a final decision, is there, under the then existing circumstances, a particle of doubt that the defendants acted fairly in fixing that value, — acted with entire good faith?**

Furthermore, the valuation alleged by the complainants in their bill of complaint is substantially the same as that set by the defendants in their proposition for a transfer. The highest value which these complainants name in their bill is $100,000.††

The defendants' valuation went well up to $90,000; that is, $50,000 to the stockholders and $30,000 to $40,000 to the creditors:‡‡ total, at the lowest, over $80,000. In 1890 it will be all of $100,000.

* p. 811; see also p. 423. † p. 812. ‡ p. 431.
§ pp. 421, 422, 346. ‖ p. 344. ¶ p. 910.
** Lauman *v.* The Lebanon V. R. R. Co., 30 Pa. St. 49, concluding order.
†† Par. XI., p. 9. ‡‡ pp. 891, 882, 867, 923 twice.

The highest offer which the complainants would make in their bill is $75,000, $75,000 gross: "$75,000 for the assets of said company,"* are their very words; not $75,000 for the surplus of assets above the amount of liabilities. And they show that that was what they intended, by their persistent effort to put that same intention into the defendants' valuation, with which theirs was in competition.†

Neither, then, in the conduct of these directors as managers of the active corporation, nor in their valuation of the corporate property with a view to the renewal of corporate existence, is there any evidence of bad faith.

There is no more of such evidence to be found as to their plan and purpose for the future of the enterprise which was under their direction. Their consideration here was not fraudulent against any one of the stockholders: it was faithful and honest to all. It was more than this: it was in the exercise of good judgment, of skill, in the matter in hand; and it was wise.

If there were any doubt about this last proposition, this Court might well refuse to make any effort, or to give any time to the attempt, to solve that doubt. But when that fact appears undisputed, the Court may consider it. They may consider it, as it is now presented, in its bearing upon the good faith of these defendants. And it will be worthy of consideration hereafter, when the decree is to be settled in its details.

Now, upon this point there is the opinion of a very large majority of the stockholders,‡ and beyond that an agreement of evidence, — an overwhelming unanimity of testimony. The witnesses for the complainants are especially strong to this effect.

But the capital evidence upon this subject is certain action of the old corporation itself, taken as long ago as 1879, and assented to and sanctioned by every shareholder who kept or acquired his shares after that date.

That action was the purchase of a new depth of mining ground, of the lode under a new quarter-section of land, which new quarter-section the lode entered at the bottom of the old mine, — that is, some thousand feet below the surface of the earth, — the Edwards purchase.

* Par. XI., p. 9. † pp. 344, 345. ‡ *In re* Niagara Ins. Co., 1 Paige, 259.

This is the quarter-section designated on the plan as "New Pewabic."* The lode in this parcel was bought by the Pewabic Mining Company in 1879, at the cost of $275,000,† which sum was paid mainly out of an assessment upon the shares, paid directly or indirectly by every present shareholder.‡

The plan shows that the explorations, which went on into 1884, have little more than entered upon this purchase: and, judging from the Quincy mine, it would take more than thirty years now thoroughly to mine it out. That is, if the work had gone on from 1883 without interruption, it would have continued at least to 1913, the whole period of a new charter.

Were not the officers of the corporation in duty bound by this unanimous action of their stockholders, as soon as they learned of the expiration of the charter, to take such steps as the laws of Michigan authorized for its renewal?

What was undertaken in 1879, must be pushed forward in 1884, unless meanwhile developments have changed the aspect of the enterprise, making what was hopeful in the former year, without hope in the latter. Such was not the fact.

The witnesses for the complainants are positive that this undertaking to find copper in New Pewabic was full of hope and encouragement after all the explorations made.

Their testimony goes to establish as follows: The yield per cubic fathom increases with the increased depth.§ In the Quincy mine — richest of all the Lake Superior mines, save the Calumet and Hecla and its next neighbor, the Tamarack‖ — the copper "trends north," "towards the Pewabic property."¶ So generally is the rich lode from which the Quincy Company draws its large dividends connected by common reputation with the Pewabic property, that it is known as "the Pewabic vein;"** that "its general name" is "the Pewabic lode;"†† "generally known as the Pewabic lode;"‡‡ and "the Pewabic lode is the second lode in value on Lake Superior."§§

This lode, purchased in 1879, cuts "under the Franklin 1,900 feet."‖‖ If the Franklin people "live, they will have to have this property."¶¶ It makes "under the Quincy and Franklin,"*** "under both properties."*** "The Pewabic cuts out the

* pp. 39, 583. † Deed, p. 873. ‡ Ffooks *v.* S. W. Rwy. Co., 1 Sm. & G. 142 (168).
§ p. 121. ‖ p. 89. ¶ p. 121. ** p. 127.
†† p. 129. ‡‡ p. 89; see also p. 432. §§ p. 89.
‖‖ p. 196. ¶¶ p. 157. *** p. 202.

Franklin and Quincy;" * "It will cut out both mines;"† "It is a key to the Franklin in particular, and, say, both mines;"‡ it may "be the key to the whole situation."§

The Pewabic property, including the Edwards purchase, is worth, according to the varying testimony of the many witnesses for the complainants, $200,000, $230,000, $250,000, $300,000, $400,000, $498,412.24 (reported by the master), and $652,225.82.‖

And the main element in this value is the copper reputed and believed to be in the lode purchased in 1879, as these declarations of those same witnesses show: "There is not a doubt but that the lode extends through the Pewabic;"¶ "The chances are as good in the Pewabic as in the Quincy;"** "The time is not far distant when the Pewabic mine will be the mine of the three;"†† "There is just as much certainty of this copper being under the Pewabic, as of the Quincy having its existence, or of the Franklin having its continued existence."‡‡

The evidence for the defendants contradicts this no farther than to present the actual market value in 1883, and including March 26, 1884, along with the facts — not disputable at all — which made that market value what it was.

There is, indeed, no evidence on either side, no expert opinion, to the effect that prudence forbids the continuance of this corporation for the prosecution of the large enterprise opened in 1879. On the other hand, besides the above expressions from the witnesses for the complainants, bearing conclusively in that direction, there is weighty testimony, in express terms, to the wisdom of the course which these defendants have attempted to pursue.

There is evidence, and of a very high character, that the action recommended by these defendants was wise and prudent.

Samuel L. Smith, sworn on behalf of defendants, qualifies himself to give an opinion upon this question by stating that he has "been interested and occupied in managing copper interests for twenty years, and [has] been connected with quite a number of the copper mines of Lake Superior as a stockholder, director, and general manager;" that he is "still so connected;" that he

* p. 116.
† p. 157.
‡ p. 193.
§ pp. 156, 157.
‖ pp. 81, 86, 90, 110, 122, 821, 820.
¶ p. 160.
** p. 128.
†† p. 114.
‡‡ p. 157.

is "personally acquainted with that portion of the copper region in which the Pewabic mine is situated;" that "the Quincy, Pewabic, and Franklin are all on the same mineral formation, and [he has] been interested in all of them, from first to last, about twenty years."*

He shows that he has, not a disqualifying, but an impartial and qualifying, interest in this cause, — that of a shareholder in the Pewabic Mining Company.†

And thereafter he testifies that its property "can be disposed of to secure the greatest value to all of its stockholders without any distinction," in this way: "in transferring it to a new company, letting them [the old stockholders] take shares in a new company, and continue to develop it, with chances of the best results;" "one share of new to one share of old, practically taking the same stock;" "the same interest in the new company they have in the old."‡

Johnson Vivian, an expert in mining, superintendent of the Pewabic mine, and of its successful neighbor the Franklin, and other mines, engaged in mining in England and America about thirty-five years,§ and in copper mining on Lake Superior twenty-one years,‖ testifies to the same effect, as follows: "If I owned the Pewabic mine, with the hope of obtaining something in the future I should be inclined to continue work and spend money."¶ And to this weighty declaration there is no opposing testimony. No witness contradicts it.

There is even no counter-allegation in the pleadings. The complainants nowhere, in their bill of complaint, allege that the proposed practical renewal of corporate life is not for the improvement of the corporate property, the promotion of the original corporate enterprise, and the advancement of the interest of all corporators as such.

On the contrary, the bill does make an allegation to the opposite effect. It alleges against these defendants "a system of discouraging reports" and "a concealment of the true value of the assets and condition of the company," in depreciation of the property.**

* pp. 418, 419.
† p. 419.
‡ p. 431.
§ p. 123.
‖ p. 124.
¶ p. 259.
** Par X., p. 9.

Here, then, is the allegation of the complainants themselves, that the unexplored mineral ground of this defendant corporation is probably valuable; that the enterprise of this expiring corporation is promising, is hopeful of success, and should be further prosecuted.

Does there remain a particle of doubt that these defendant directors, in their attempt, in 1884, to acquire for their constituents — all of them without distinction — a new lease of corporate life, acted in perfect good faith towards all of those constituents?

This allegation of the complainants against the defendant directors, of "discouraging reports" and "a concealment of the true value of the assets," being supported by no evidence, and being unsustained by the Court below, might well be left without further comment. But it has a logical aspect and an expressed connection which may be used to show in still stronger light the complete good faith of these defendants. Discouraging reports and a concealment of value of assets would logically imply a desire to get those assets away from its present owners, for an inadequate consideration. And this desire is expressly alleged: the defendants are expressly charged with the purpose of "procuring a sale of the property, at private sale, for less than its value."*

Now, the case shows no action whatever in execution or attempted execution of such a purpose. There is no indication that they ever entertained that design. All their action in the premises has been *alio intuitu*, with the very opposite aim and with antipodal intent. As far as the east is from the west, so far have their thoughts and meditations been from that design or desire. They have attempted nothing but the re-incorporation of their old stockholders; plainly so, in their action of 1884, now before this Court.

And later action of theirs — action taken pending this appeal — has been more direct and indisputably plain toward this same fair and righteous end. This appears in the Statutes and judicial decisions of Michigan, where this Court can take knowledge of it, and was briefly as follows: —

The privilege of renewing, by a vote of two-thirds of all the stockholders, corporate life, the exercise of which the legislation

* Par. IX., p. 9.

of 1882 confined within the last year of the charter period, the Michigan Legislature of 1887* enlarged in time, so that it could be exercised at "any time before the dissolution of the corporation shall become complete."

Under this last enactment, at the call of these defendant directors, the shareholders of the Pewabic Mining Company came together, on February 4, 1888, and, as authorized by Statute, resolved to extend the corporate life of that corporation for a period of thirty years from April 4, 1883, with the shareholders then holding, all of them, these complainants included; every individual whose name was on the list, without distinction.

What came of this action will be developed later, when this argument shall find it in order to unfold to the Court the bad faith, the inequitable aim, — yes, the iniquitous purpose, — of these complainants. In this stage of the discussion it is enough to present it as an effort of these defendants not to deprive any of their shareholders of any of their shares, but to add to their value by making them corporate shares, and to reclothe all these stockholders with powers as corporators: to re-enfranchise them all.

Thus, through all the action of these defendants, their good faith has been transparent. There has been no sinister purpose, no corrupt design, no scheme of private or partisan advantage, nothing oblique, or of ulterior, concealed aim, anywhere in all their course. Every step on their part has been straightforward and open, in the light of day, and capable of enduring that light.

THE DEFENDANTS ARE IN COURT WITH CLEAN HANDS.

Second.

THE COMPLAINANTS ARE NOT WITH CLEAN HANDS IN THIS CASE.

The standing of the complainants is now to be considered. Here it is admitted that the complainants have a right in law and equity to withdraw their portion of the corporate property from the whole. Nothing inequitable is alleged or intimated in any

* March 19, in amendment of Act of 1882.

litigation on their part, properly directed to that object alone. If they were now in Court with this as the real object of their suit, they also might be suitors in equity with clean hands.

But they are not here with that as the real object of their suit.

In their answer, the defendants distinctly charge that this bill was brought in interests rival to those of the corporation in which, as stockholders, the complainants sue; for special advantage also to themselves, not as such stockholders, to be derived from injury to the general interests of other stockholders. They show that charge to have been publicly made in the stockholders' meeting, and not denied by the complainants present.* And this counsel has found no such denial in the record, although it contains a memorandum of the brief for the complainants in the Court below.† This allegation of the defendants, then, is "to be taken as confessed in the pleadings." ‡

Besides these undenied allegations in the answer, there is other evidence of the bad faith of these complainants.

They do not, in their bill of complaint, content themselves with praying that their share of the corporate property may be ascertained and handed over to them. They have never, anywhere, in any phase of this controversy, asked that such share may be set off to them, — a fair and equitable prayer. Nor have they, at any stage of this or any other case touching the controversy herein involved, shown any willingness to be satisfied with such segregation to themselves, with a control over so much of the corporate property as *belongs to them*. They have heretofore insisted, and are now insisting, that they shall be allowed to direct the disposal of all that property, including, of course, what belongs to all the other shareholders. They will be satisfied with nothing but a sale of the total property at public vendue. They demand that the whole be distributed among all the stockholders, — an officious, meddlesome, inequitable, and injurious request, in its general and essential character. And in its particular aspects — that is, by the special facts in this case — it is aggravated into an inequitable artifice and scheme, an iniquitous proceeding to obtain this whole property at a price below its value.

* Par. 15, pp. 32, 33.

† pp. 57–63: see Waterbury *v.* The Merchants', etc., Co., 50 Barb. 107.

‡ Sparhawk *v.* Union, etc., Co., 54 Pa. St. 401 (457).

When the complainant Smith appeared in the stockholders' meeting to oppose the consummation of the re-organization, the testimony is, that he did not "object to the price." "No, sir; he simply wanted the sale of the property to the highest bidder. His protest was against a renewal of the charter; not against the price fixed, because every one knew the price was nominal." *

The protest completely supports this testimony of the witness Demmon, corroborated as he is by two others, Chandler and Perkins.† That protest does not mention price, — any price whatever. It protests "against any sale, transfer, and conveyance of either of the real and personal property of said company to a new corporation to be organized under the mining laws of Michigan, and the receiving in payment therefor of the capital stock of said new corporation,"‡ without any qualification or condition as to price, to any sale whatever for the purpose of retaining the corporate property to its actual owners, in prosecution of the original enterprise.

That protest was obviously drawn and signed before the opening of the meeting, when the complainants had no knowledge of the action which these defendants intended to recommend to the shareholders, other than what was contained in the official call of the meeting. And that call mentioned no price. It recited merely a sale to a new corporation, to be paid for in the stock of such new corporation, in almost the exact words of the protest.§

And against this sale, without regard to price, against such a sale at any price, against any sale which continued the old stockholders as a body politic, these complainants raised their protest.

And their protest goes on to rest itself on "the following grounds." ‖ And among those following grounds there is never a mention of price.

The first ground stated is, that, "without the consent of each and every stockholder," the corporation "has no legal right, authority, or power" to make such sale.¶ Without regard to price; at any price whatever. Does that look like a protest against an inadequate price?

* p. 896. † pp. 868, 869, 880. ‡ pp. 7, 8.
§ pp. 411, 902. ‖ p. 8. ¶ p. 8, clause 1.

And in the second ground is stated the only "legal right, authority, and power" which these complainants then and there did allow to this defendant corporation. That was the power to sell, and receive "cash in payment." And they here again repeat their protest "against any sale" "otherwise than for cash." And they then "insist and demand that the real and personal property of said Pewabic Mining Company be sold for cash." *

Not one word about inadequate price in all this. On the other hand, they protest against something else besides price: they object to a renewal in any manner of corporate life. They set themselves against the intention of their associates to continue to hold their own property. They set themselves against that, without condition or qualification. They declare that they have the absolute legal right, authority, and power unconditionally to defeat that intent. They ask no equitable imposition of proper conditions. They demand and insist upon a sale for cash.

Later they opposed a still more direct and simple form of re-incorporation. In 1888, when the Legislature of Michigan had tendered to these shareholders an extension of their incorporation, — pure and simple, — clothing with a franchise all the shareholders, involving not even a nominal sale, they protested against its acceptance, and finally procured it to be vacated, as will later be narrated.

And they seek the same object, and pursue the same line and the same purpose, here.

Meanwhile, in all this opposition to the continued existence of this corporation, the complainants have no grounds whatever which can properly support corporators in such opposition. And they do not pretend to have any. They do not even allege that a continuation of the corporate enterprise is unpromising; and their own testimony to the opposite effect is unanimous and overwhelming.

They unblushingly put forward their claim to bring this enterprise to an untimely and abrupt end, upon their right to exercise their own caprice in that matter.

The prayer of the bill of complaint is, "that all the assets and property of said Pewabic Mining Company be sold at

* p. 8, clause 2.

public vendue," "to the highest bidder;" and that the proceeds, after payment of the debts, be distributed "to the stockholders *pro rata*, according to the amount of their respective holdings;" * "that a receiver be appointed," with all the power of a receiver in such cases, to wind up the affairs of said Pewabic Mining Company, and distribute its assets." †

This is officious and intermeddlesome, for (1) there are no creditors in Court asking the Court to see them paid; and (2) a large majority of the shareholders are here to oppose such distribution of their portion of the corporate property. The equity of the complaint is satisfied and exhausted when the complainants receive the money value of their portion of the corporate property.

In thus asking for, and insisting upon, a compulsory sale of this property, the complainants are going beyond their own rights for the purpose of making an inequitable demand. They are making that inequitable demand for an iniquitous purpose: not for the legitimate object of protecting their interests as shareholders, but for the purpose of creating an opportunity to them, as intending purchasers at such compulsory sale, — an opportunity to purchase at less than the actual value.

That they desire to purchase, that they intend to purchase if the price is low enough, appears in their very bill of complaint. They place themselves before the Court as willing to take the property, as would-be bidders for it; and they actually make their bid. If they can get this property for $75,000, they will take it.‡ And that offer, as already shown, is the lowest bid yet made.

Further, these complainants are shown to be interested in the Quincy Mining Company:§ one of them is a director thereof;‖ another is a son of the president of that company.¶ The map shows this unexplored lode of the Pewabic Company to underlie, in part, the operations of the Quincy Company. The testimony for the complainants shows the copper in the Quincy mine to trend towards the Pewabic property;** that "the chances are as good in the Pewabic as in the Quincy;" †† and that "the time is not far distant when the Pewabic mine will be the mine

* Par. XV., clause 2, p. 10.
† Id., p. 11, clause 8.
‡ Par. XI., p. 9.
§ Ans., par. 15, p. 32.
‖ p. 903.
¶ Ans., par. 15, p. 32.
** p. 121.
†† p. 128.

of the three."* This certainly shows it to be a desirable acquisition to the Quincy Company. And the president of that company, father of the complainant Mason,† called by the defendants, on cross-examination by the complainants, testifies that for "a period of three or four years," to use his own words, "I was waiting for some proposition for which I could purchase the property." "About the time the sale was accomplished to the Pewabic Company." It was known that "I would like to buy it."‡

An actual purchase in the Quincy interest, or in the interest of these complainants, appears in the case. For, after these defendants were actually and fully, by the expiration of the charter and knowledge thereof, prevented from raising by assessment any money for corporate purposes, there was a sale on execution of real estate of their corporation; and the purchase was by one of the attorneys of the complainants in this case,§ the Quincy Mining Company furnishing the money to pay for it.‖ (It is not these complainants, but the defendants, who have redeemed the property from that sale.)

Not only have these complainants endeavored to procure a compulsory sale of the property, to the end that it may be purchased to their advantage, but also they have heretofore endeavored, and are now endeavoring, to diminish competition of bidders at such sale.

Of mining land like this, and plant for mining, there can be no sale except to mining companies; and among such companies the competition will, generally, be confined to those to which the location of the mine is convenient and favorable.

Looking at the plan of this property,¶ it will be seen at once that there are, or have been, three companies to whom the location of this Pewabic mine is convenient, — three companies whose working shafts, produced, would reach the lode purchased by the Pewabic Company in 1879.

These have been the Quincy, Franklin, and Pewabic Mining Companies. And of these three, the most promising competitor — the competitor who would not have allowed the property to be disposed of at a sacrifice — was the present owner of the property, the Pewabic corporation; the shareholders who, in

* p. 114. † Ans., par. 15, p. 32. ‡ pp. 268, 269.
§ p. 831. ‖ p. 852. ¶ pp. 39, 583.

1879, paid for it out of their private resources. And this corporation is disabled from competing at that sale by the action of these complainants. Their action in this suit to that end, and not to any milder measure of obtaining what belongs to them, need not be again recited here.

But their action against the subsequent attempt of these defendants to re-invigorate their corporation remains to be stated. That attempt was the acceptance by these stockholders of the privilege extended to them by the Legislature of Michigan, of renewing their corporate existence by a two-thirds vote. This done, it was open to these complainants — if they wanted their distributive share of the corporate property, and nothing else — to go into a Court of Equity, Federal or State, and ask for that. Thus, they could have obtained their individual property without annulling the re-incorporation of their associates. But they would not take that conscientious and equitable proceeding.

They brought *quo warranto*, at law, that they might have judgment ousting their associates from their attempted re-incorporation. They alleged the Statute which authorized this renewal of corporate life to be in violation of the Constitution of the United States, as impairing the obligation of a contract; and in violation of the Constitution of the State, as depriving the relators, these complainants, of their property without due process of law. And the Supreme Court of Michigan refused to sustain either of these allegations.

That Court did, however, find very narrow and technical ground, and wholly confined to Michigan, on which to give judgment of ouster against the defendants. The Constitution of that State provides that, with irrelevant exceptions, "no corporation" "shall be created for a longer time than thirty years." *

And the Court held that that provision prohibited the Legislature from authorizing the renewal of the corporate existence of any corporations after a corporate existence of thirty years.

This decision, however, does not apply to the creation of a new corporation out of a portion, or even the whole, of the old shareholders. It is enough that such corporation should be as the complainants allege was the fact in this case, — technically "a new corporation," a new legal entity, a new body politic and

* Art. XV., Sect. 10.

corporate.* If it were the same old corporation that before owned the property, what would be the meaning of their prayer against a "transfer" of the property? †

This remains just as constitutional as in 1878, when the Quincy Company used it,‡ or when the National Company used it,§ or when Mr. Pond advised it.‖

Thus, upon the action of these complainants — action not at all necessary to their obtaining all their rights — these defendants are now before this Court, still disorganized, and unable as a corporate body, acting through their trusted directors, to appear at a sale of their own property, should this Court order one, and, by competing bids, to prevent it from being sold for a song. And in thus disabling competition at the sale which they are striving to procure, they further show the indirect object and bad faith of their complaint.

In their insisting upon a compulsory sale of this property, the bad faith of these complainants towards these respondents appears in the time when they became stockholders, if that time be considered in its proper relations.

They first became stockholders in October, 1882, then buying fifty shares; and all the rest of their shares were purchased later.¶ That is, they bought after the corporation had made the purchase of 1879, towards which purchase, then, all the shares which they bought had contributed. They came in as successors to corporators, who had actually pledged themselves to a continuance of the corporate enterprise until the lode, newly purchased, should be properly explored; and, if what they themselves say is true, they came in without notice of the approaching expiration of the charter.

They came in, then, as to a continuing corporation, with the intent, and for the purpose, of sharing in the prosecution of the original enterprise of the company as modified and extended by the purchase of 1879. They voluntarily submitted their share of the corporate property to be continued in the corporate enterprise at the pleasure of two-thirds of their associate shareholders. For such was the law of Michigan as applicable to this corporation when they purchased their shares: to wit, from the beginning of October, 1882, to April 4, 1883. If, by the

* Protest, pp. 7, 8; also clauses 1 and 2, p. 8; par. X., p. 9.
† Par. XV., pp. 10, 11. ‡ p. 902. § p. 918. ‖ p. 919. ¶ pp. 66, 433.

expiration of the charter on this last-named date, they acquired the legal right to withdraw their shares from the corporate stock (which the defendants do not here deny), they did not thereby acquire any right in equity to prevent their associates from going on in the enterprise with so much of the corporate property as belongs to those associates, — that is, with the whole of it, after the complainants are paid for their portion.

Thus, coming into this corporation, acquiring shares which were, by contribution to the purchase of 1879, pledged to a continuance of this enterprise, is it in good faith on their part to seize the first, and press to harsh extremity the second, opportunity which the technical rules of law raise for them, to compel, not merely the withdrawal of their share, but the compulsory sale of the whole property, and the termination of the corporate enterprise?

The complainants would have their intent to continue in the enterprise accompany all their purchases prior to their knowledge of the expiration of the charter; that is, their purchase of all the shares on which they brought this bill of complaint.* Down, then, to February 19, 1884, the date of the call for the stockholders' meeting of March 26, 1884, which was to take action upon the expiration of the charter, these stockholders, as they themselves say, entered the corporation in contemplation of its continuing in corporate existence.

If they bought with this purpose and intent, and under an implied pledge to their associates to fulfil it, good faith to those associates, even under the changed technical conditions, requires that they should now content themselves with a withdrawal of their portion of the corporate property in the manner least injurious to their associates, and that they should not insist, as a *sine qua non*, upon a compulsory sale of the whole property, — an arrest of the corporate enterprise, and an absolute dissolution of the corporation.

Nor have they clean hands here, if, entering the corporation with honest intent to continue in the enterprise, they now pervert their unexpected right to withdraw from it, into a scheme to injure their associates. They have a right, an undoubted right, to use a compulsory sale of this property in order to enable them to obtain their share of the corporate property, if it is absolutely

* p. 825.

necessary to that end. But upon this record, it is submitted that that is not what they are doing. That is just what they are not doing. On the other hand, they are using their right to a portion of the property in order to procure such compulsory sale. Their distributive portion should, in equity, be the end; and the compulsory sale, if necessary, the means. In fact, their ownership is the means merely, and the compulsory sale the end, of all their suit. And a suit thus prosecuted is not prosecuted in good faith.

If these complainants, in 1882 and 1883, when the affairs of the Pewabic Company were putting on their darkest aspect, became shareholders therein with any other intent than that of continuing in the prosecution of the enterprise then on foot, what was that other intent?

They deny notice "of the expiration of said charter, or the time that it would expire." This is hardly a denial of knowledge.

Their counsel, in his cross-examination, implies* that it is something out of the common course, that neither the Pewabic counsel at Houghton nor the resident director — both within short distance from the court-house — did, from the papers there to be seen, learn of the time of the period of the charter, — before November 1, 1883. And how was it with the complainants?

They, as one of them testifies, were "stock-brokers;" had known the Pewabic Mining Company "for more than twenty years;"† had "been accustomed to see their reports from year to year," "regularly;" had "always been familiar with" those reports, and "with the mining companies of Michigan."

And this complainant then produces,‡ as previously lying in the office of his firm, eight annual reports of the operations of the Pewabic Company. Preserved there for what purpose? Of course, for the proper purpose of making these stock-brokers acquainted with those operations and with the financial condition of the company, to the end that they might intelligently advise their customers — and themselves, it appears in fact — in the matter of buying and selling that stock. When, in skilful action of stock-brokers, were those reports to be consulted? Of course, before and in view of any large dealing in that stock; that is,

* p. 899. † p. 77. ‡ pp. 67, 68.

in this case, before commencing a purchase of as many as twenty-five hundred shares. And these reports, thus consulted, would have shown, in six different places,* that the Pewabic Mining Company was in active operation as a corporation in the year 1853; and, under the Constitution of Michigan, such corporations may not run beyond thirty years.

And, familiar as these complainants were with mining companies, they knew that at the State capital and the county seat, the exact period of this corporation was of public record. And the county seat was as near to the Quincy mine and its counsel as to the Pewabic. With their view, here maintained, of the law of corporations, — to wit, that any one shareholder, of any one share, could absolutely prevent the extension of an expiring charter, and bring the whole corporate property to the auction block, — was it the course of wisdom on their part to purchase twenty-five hundred shares in this corporation, without ascertaining when that power would come to every stockholder?

If they learned when that power would come to themselves by purchase of shares, and purchased with intent to exercise it when it did arise, what claim have they upon a Court of Equity for aid in the execution of that iniquitous intent? Legal rights they may have, which even a Court of Equity, with full knowledge of their bad faith, must respect and protect. But this is all that such a Court is bound to do in their behalf. They are not entitled to its favor. They are under its disfavor.

THEY ARE NOT BEFORE THIS COURT WITH CLEAN HANDS; THAT IS, WITH THEIR DEMAND FOR A COMPULSORY SALE.

Third.

THE EQUITY OF THE COMPLAINANTS DOES NOT REQUIRE THE SALE PRAYED FOR; AND THE EQUITY OF THE DEFENDANTS FORBIDS IT TO BE ORDERED.

The complainants have made neither allegation nor proof, that the sale at public vendue, which is the very burden of their prayer, is necessary in order to enable them to secure all that

* pp. 489, 490, 515, 576, 537, 538.

belongs to them, even as they allege their belongings. They do not show that they cannot obtain to themselves their share of the corporate property in any other manner than by such sale. They do not show that that is even the best way in which their equity may be satisfied. It nowhere in the record appears that the value of the whole property of the expiring defendant corporation cannot be judicially ascertained. There is neither finding, evidence, nor even contention, to that effect in any part of the case. And this fact ought to appear, before it is accepted as a basis of judicial action. On the other hand, it is apparent that such value can be judicially ascertained.

The value of the whole being determined, that of the complainants' share is easily obtained. Little more than a division of that whole by sixteen is required.

Still more important, there is no indication, to the mind of this Court, that this corporate property will bring more, if put up at a compulsory sale, under judicial decree, than the sum at which the Court may be led to value it. The complainants base their positive demand for such a sale, not upon that consideration. That consideration they do not deem any part of their case, as petitioners for such sale, to present to the Court. They deem it sufficient to the support of their prayer, that they set out their absolute, unqualified right to have such a sale. If the complainants are not interested in having this property bring a fair price when sold, the defendants are. The defendants do not wish property for which they paid ten dollars and more per share exposed to the hazard of a compulsory sale.

Let the Court consider the practical difference between the two methods of ascertaining the sum due to the complainants; for a sum in money is all that they pray for. Let the two methods be considered as operating upon the desire of the defendants to retain their own property. Let the same value be assumed to result in each method: for instance, the sum thought of by the Court below, $500,000.

Now, upon a valuation at that sum, the defendants may perform all the equities set up by the complainants by raising and paying, as directed by the Court, about one-sixteenth of that sum, — not a great deal more than $30,000.

This done, they are in unembarrassed control of their own property, to be used and enjoyed in any manner allowed to them under the laws of the sovereign State of Michigan.

If they wish to accomplish the same purpose under an order for a compulsory sale for cash, which sale for cash is what the complainants demand, then a much more laborious and expensive method must be taken to reach the same result to both parties — the same result precisely; that is, their share in money to the complainants, and the rest of the property to its present owners, the defendants.

Then, the defendants must raise in cash the whole supposed sum, — half a million dollars, — pay it over to the selling officer, to lie in his hands till the account of sales can be settled, and the expenses of sale shall be paid, and then the net proceeds to be disposed of, how? In round numbers, one-sixteenth to the complainants and fifteen-sixteenths to the defendants.

The same final result in both methods; the equities of the case performed, and nothing more.

But what a hardship is laid upon the defendants by the method insisted upon by the complainants! If this property is worth that sum, they must contribute per share (the number of shares has been doubled since 1879) the same amount as in the original purchase, or double the amount on every share then held. How can this be done, with no corporate capacity to act?

Meanwhile, let it be noticed that if the present owners are disabled from purchasing, the best competitor is prevented from bidding, and the chances of a sale far below the sum just supposed are increased.

The plan shows that there have been three mining companies whose working shafts, produced, would reach the lode purchased by the Pewabic Company in 1879; to wit, the Quincy, the Franklin, and the Pewabic. And of these three, the most earnest competitor must be supposed to be the company that once showed itself willing to purchase; that is, the Pewabic. Except under an absolute necessity, a sale ought not to be ordered while that company is disabled from bidding; least of all ought it to be ordered merely on the petition of those who have disabled the Pewabic Company from taking part in such competition.

If the complainants have any interests which can be served by the ordering of a sale under such disadvantageous circumstances, those interests must be interests as intending purchasers. They cannot be interests, pure and simple, of shareholders in

the Pewabic Company, of selling owners of the property. On the other hand, in resisting the order for such a sale, these defendants are asserting merely their legitimate interests as present owners of the property in question.

Their action shows itself intent upon making the most of the corporate property, for the benefit of all its owners. It is hardly possible that it could have other aim. A large majority of the shareholders could not well be moved in united action save for the general good. But a small portion — one-fifth, even — might easily have schemes for the promotion of their interests, apart from, and even hostile to, the common good of the common corporation.

No measure could afford a better opportunity for the operation of such schemes than a compulsory sale for cash of the whole corporate property, especially where that property consists of mining plant and mineral lands. It would be very hard indeed to justify an order for such a sale, on the petition of a small faction of the shareholders, especially if that faction were tainted with a strong suspicion of bad faith towards the common enterprise, and of a design to make gain out of the wreck of the corporation.

The Court below foresaw the hazard of a sacrifice of this property, through want of competition, at a compulsory sale at public vendue to the highest bidder. This plainly appears in the condition which was to defeat that sale, which the Court attached to its order thereof, — its closely attached proviso, to this purport: "that if, at such sale, the bid for the aggregate of the property and assets of said company should not be in excess of fifty thousand dollars above the amount of the debts of said company," "then that the arrangement for the sale of the property of said company made at the stockholders' meeting in Boston on the twenty-sixth day of March, A.D. 1864, and as set up in the defendants' answer, shall be carried out." *

That is, a minimum limit was to be fixed at the opening of the auction. And if that limit was not passed, then there was to be no compulsory sale: but the sale attempted by the defendants, and thus far enjoined at the suit of the complainants, was to be relieved from injunction and completed. The real value of the

* p. 923.

complainants' shares being thus secured to them, the re-incorporation intended by the defendants was to be accomplished under the direction, and with the resulting protection, of the Court. The whole equity of the complainants was deemed satisfied when they got the value of their shares.

It is seen at once that this condition of defeasance is not adequate to effect its intended purpose. A bid in trifling excess of the named minimum would be outside this defeating condition, and yet not save the property from sacrifice. It is essential to the protection of the defendants that the decree to be made, should be effective to the execution of this equitable intent towards them, of the Court below, as manifested in the above inadequate safeguard. This can be done in the manner submitted by the defendants, — the defendants to pay the value of the complainants' shares, when ascertained.

Such a decree, the defendants believe, will be a Solomon's judgment, ascertaining the real purpose of this complaint. The defendants will not be required, or even allowed, to pay for a single share withdrawn. A compulsory sale made hopeless, there is nothing left that the complainants will sue for. A new charter made certain, they desire to be under it. A re-incorporation assured, they mean to be among the corporators.

IN FINE, NO NECESSITY TO THE COMPLAINANTS APPEARS FOR SUCH SALE, AND ITS ORDERING WOULD BE HIGHLY INJURIOUS TO THE DEFENDANTS.

THE LAW OF THIS CASE.

I. Neither the Constitution of Michigan or of the United States, nor the common or statute law of that State, nor the principles of equity as administered in the United States Courts, give the complainants an absolute right and title to have ordered a compulsory sale of the corporate property of the expiring defendant corporation. Nor has the Court below any direct duty, or even authority, to make such an order. It has no express jurisdiction to that end as a substantive right. As against the attempted proceedings of the defendants an "injunction is not of right, but of grace:" * still more an order of sale.

* Sparhawk *v.* Union Pass. Rwy. Co., 54 Pa. St. 401 (454).

The Court is not bound to decree a dissolution, even when a majority of the directors and stockholders request it to be done.*

II. The only substantive right of the plaintiffs shown anywhere in this case is their right of property in their distributive share of the assets of the expiring corporation; and any claim of theirs to have ordered such compulsory sale must be considered as incidental to that right of property, and not substantive at all.

The only jurisdiction which the Court has to order such sale is as a necessary incident, in equity, to the securing for the complainants of the value of such distributive share, — the value of such share in money, and not the portion in kind: for the complainants' prayer is not for a set-off in kind, but for a payment in money.

III. Such necessity must be shown, and shown clearly. And if the method of ascertaining the value of their share, prayed for by them, appears to be injurious to the interests of the defendants, then such necessity must be shown to be absolute and exclusive. It must appear that there is no other less objectionable way in which they can obtain that value. The complainants, being allowed to withdraw from the corporate enterprise, must withdraw in the manner least injurious to their associates.

IV. In the present case the method of compulsory sale is unnecessary, — entirely unnecessary to the doing of complete equity to the complainants. The case shows that the Court below would have found no difficulty in ascertaining the actual value of the assets of this corporation, had it proceeded to a consideration of that question. The Court below simply declined to attempt to ascertain the exact value as a basis of its decree,† while the case shows that it could have been easily ascertained.‡ Neither party has alleged otherwise. An allegation otherwise would be absurd. The value of one-sixteenth of the net assets of this corporation is ascertainable, — easily so.

* *In re* Niagara Ins. Co., 1 Paige, 259. † p. 922. ‡ p. 820.

V. On the other hand, such a sale would be very injurious to these defendants and to the large body of stockholders whom these defendants include or represent.

This sale can be to no proper practical purpose, which this tribunal can promote, save that about one-sixteenth of the net proceeds be paid over to these complainants.

VI. In this case the value to be ascertained is as of March, 1884, when the defendants attempted to prosecute further the original enterprise, and were prevented by the bill brought by the complainants. And a sale in 1890 would not ascertain value in 1884.

VII. The property in question — mineral land in large block, and mining plant, more or less affixed to land — is of a kind which, in general, ought not to be disposed of at public auction.

VIII. Any competition at such sale on the part of these director defendants, as authorized representatives of their stockholders, having been rendered impracticable by the action of these complainants, the sale is likely to be a sacrifice for want of competition. The complainants have even withdrawn their obligation to bid, as offered in their bill.*

IX. It is a case of a compulsory sale, prayed for in behalf of only about one-sixteenth of the whole property to be sold: the large residue resisting the application. Such sale not being necessary to the securing of any right of the complainants (the only rights asking the protection of the Court), it seems as though the objection thereto of a large majority of the shares ought to be controlling and conclusive. "It is strong evidence that the interests of the stockholders generally" will not be promoted by the sale prayed for.†

In the actual aspects of this case, the opposition of an overwhelming majority of the owners is of itself sufficient for a decree against such sale. "The particular interest of the few must give way to the general interest of the many."‡

* p. 65. † *In re* Niagara Ins. Co., 1 Paige, 209. ‡ *In re* Niagara Ins. Co., *supra*.

Michigan law has a provision * for the dissolution of corporations, at the suit of stockholders: under conditions, however, not existing in this case.

But such suit can be brought only on the prayer of the holders of not less than one-third of all the shares. And the opposition of two-thirds of the shares is sufficient to prevent a decree of dissolution, if made manifest at any time before such decree becomes final.

X. There is no evidence that the continued prosecution of the original enterprise aimed at by the defendants is not, so far as can be judged, for the benefit of the corporate property and the best interests of all the stockholders. On the other hand, the evidence that such prosecution is in the exercise of a sound business judgment, is uncontradicted and overwhelming. There is not even allegation against it.

In seeking to thwart this aim, the complainants rest their justification solely on their absolute right to exercise their caprice.

Such caprice is a very meagre and scant support for any action of a Court of Equity in their behalf. The right of caprice extends in full only to several property. When one becomes the owner of property jointly with other owners, he loses some of his rights of caprice. He comes under obligation to regard the interests of his co-owners in his handling of the thing owned. He is bound not to injure their interests in the mere indulgence of such caprice. This duty to his associates a Court of Equity should enforce against him, even in his withdrawal of his share from the whole joint property.

XI. Any interest in a compulsory sale which these complainants might have as prospective purchasers at such sale, either as individuals or as stockholders, or persons interested, in a rival corporation, is of no weight in favor of an order for such sale. That is not an interest proper of a corporator, and "nothing but the benefit to be received as a corporator" is now to be considered.†

"To entitle a stockholder to maintain a suit of this nature," the Court must "feel that he is acting for the benefit, or what he believes to be the benefit, of the company."‡ The suit must

* April 11, 1877, Sect. 42: H., Sect. 4117.

† Irvin *v.* Susquehanna, etc., Co., 2 Penrose & Watts (Penn.), 471.

‡ Filder *v.* Rwy. Co., 1 Hem. & M. 489: Waterbury *v.* Merchants', etc., Co., 50 Barb. 168: Belmont *v.* Erie Rwy. Co., 52 Barb. 662.

have "in view the legitimate purposes of the company,"—must "be a *bona fide* one, faithfully, truthfully, sincerely directed to the benefit and the interests" of stockholders as stockholders.* The *bona fides* of the complaint must be "unquestioned, or capable of vindication if questioned." "A stockholder is bound to come with clean hands, with a sincere complaint, free from all false pretences." The genuineness of his character will always be looked to. "The question is whether this is a stockholders' bill." †

For, "under the pretence of serving the interests of one company, the shareholders in a rival company, by purchasing shares for the purpose of litigation," cannot make a Court of Equity "the instrument of defeating or injuring the company into which they so intrude themselves." ‡ The object of the suit must not be "to establish the interests and benefits of a rival scheme." The plaintiff must not be "the puppet of another company." § An interest, either direct in a rival corporation, or in any way adverse to the company whose interests the bill pretends to champion, "is fatal to the suit." ‖ A bill brought in such adverse interest may even be stricken from the files as "an imposition upon the Court." ¶

XII. As matter of precedent, the method of compulsory sale is unusual in analogous cases. Where Courts have interposed for the protection of the rights of dissentient corporators, against the organization or action of a majority of their associates which could not lawfully be imposed upon the dissentients, there the remedy has not been that of a compulsory sale of the corporate property or a vacation of the organization. In all the examination of decisions which all the controversy between these parties has raised, not a single case of such dissolution or prevention of the organization has come to the knowledge of this counsel, at the time of this writing, in America or England.

XIII. The only method in which Courts of Equity do equity in cases of this character is by imposing upon the enterprising

* Forrest *v.* Manchester, etc., Rwy. Co., 4 De G., F., & J. 126 (130).
† Sparhawk *v.* U. Pass. Rwy. Co., 54 Pa. St. 401 (454).
‡ Ffooks *v.* S. W. Rwy. Co., 1 Sm. & G. 142 (167).
§ Forrest *v.* Manchester, etc., Rwy. Co., *supra*.
‖ Waterbury *v.* Merchants', etc., Co., *supra*.
¶ Robson *v.* Doders, 8 L. R. Eq. 301.

majority, terms in favor of the opposing minority. Those who would go forward are required to secure to the dissentients the payment of the value of their portion of the corporate property, payment to be made as soon as value is judicially ascertained. Upon the furnishing of such security, the majority are allowed to go forward with their organization or enterprise. This method was approved in the cases named below. It is as fully within the jurisdiction of the Court as any other method of ascertaining value.*

The case nearest parallel to the present is to be found in England. A quarry company being in process of liquidation, with a view to winding up, the holders of a majority of the paid-up shares conceived the purpose of continuing the company, and accordingly, by a representative, prayed that "all further proceedings in relation to the winding up of the company might be stayed." One holder of a hundred and fifty shares, considering the experiments intended by the majority, and for which he would have to contribute, "would be fruitless," appeared in opposition to the above prayer, being "desirous that the liquidation should proceed, and the slate quarry sold in the usual way." He was not allowed to stand in the way of the wishes of his fellow-shareholders. He was merely allowed fourteen days "within which to elect whether he will remain a member of the company, or will retire and give up his shares;" on his election to retire, the value of his interest to be referred for ascertainment, and thereafter to be paid by the petitioner.†

Let the injunction, is the decree in one case, "be dissolved on the defendants giving security to the plaintiff in double the market value of his stock, to pay for said stock when its value shall be ascertained."‡

XIV. The Court below recognized the right of the defendants to go forward to a re-incorporation, provided they gave to the complainants the equitable value of their shares.§

This equitable result, however, aimed at by the Court, could not be accomplished in the manner arranged by the Court, or in any way through a sale.

* Lauman *v.* The Lebanon V. R. R. Co., 30 Pa. St. 42; The State *v.* Bailey, 16 Ind. 46 (51).

† *In re* South Barrule, etc., Co., 8 L. R. Eq. 688.

‡ Lauman *v.* The Lebanon V. R. R. Co., 30 Pa. St. 49.

§ pp. 922, 923, 924.

Conclusion.

That this equity, along with all the other equities of this case, may be completely satisfied, the defendants ask that the usual practice of Chancery Courts in like cases may here be followed: that the defendants may be ordered to secure the payment to the complainants of the value of their shares when ascertained, and upon the giving of such security, the injunction upon the defendants may be dissolved, and the defendants be allowed to complete the suspended transfer.

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